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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 11, 1974. Rehearing was denied on April 24, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 494 F.2d 987, is printed in Appendix A. Petitioners were originally granted judgment by the United States District Court for the District of Columbia. The opinion of the District Court, which is reported at 357 F.Supp. 509, is printed in Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 11, 1974. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on April 24, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary of the Interior may assess civil penalties against mine operators without making and publishing factual findings?

STATUTE AND REGULATIONS INVOLVED

This case involves interpretation of Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a), the pertinent portions of which are printed in Appendix C.

The applicable procedural regulations of the Secretary of the Interior dealing with assessment of civil penalties, codified as Title 30 Code of Federal Regulations, Part 100, are reproduced in Appendix D.

STATEMENT OF THE CASE

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act) established interim safety and health standards for underground coal mining, and vested in the Secretary of the Interior the authority to enforce such standards. The Secretary in turn delegated to the Director of the Bureau of Mines the function of carrying out mine inspection and enforcement activities through a staff of mine inspectors who are authorized to issue violation notices, to order abatement of violations, and to order withdrawal of miners from a mine whenever, in the inspector's opinion, a condition of imminent danger exists.

The Act provides in Section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary of the Interior in an amount not in excess of $10,000 for each such violation, and that in determining the amount of the penalty the Secretary shall consider (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

The procedure to be followed in assessing civil penalties is explicity spelled out in Section 109(a)(3) of the Act. It provides that a civil penalty shall be assessed by the Secretary "only after the person charged with a violation under this Act has been given an opportunity for a public hearing and *the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted,* and incorporating, when appropriate, an order therein requiring that the penalty be paid." (Emphasis added).

Initially, at the time the Act became effective, the Secretary delegated his penalty assessment functions to the Interior Department Board of Mine Operations Appeals, and adopted procedural rules which required that penalty assessment determinations be accompanied by decisions "incorporating findings and conclusions and the reasons or basis therefor, on the material issues of fact, law or discretion presented on the record."[1] If these procedural rules had been adhered to the present action would not have been brought.

However, some nine months later, the Secretary issued entirely new regulatory procedures for assessment of civil penalties, designated as 30 CFR Part 100.[2] This procedure which is the subject of plaintiffs' complaint in this lawsuit, delegated to "an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines," the authority to determine the liability of the mine operator for a civil penalty and the amount of penalty to be proposed. (30 CFR Section 100.4(a); Appendix D, p. 2).

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[1] Title 30 CFR Parts 300 and 301, published March 25, 1970, Federal Register, Vol. 35, pp. 5255-5258.

[2] Federal Register, Vol. 36, No. 11, January 16, 1971.

Briefly stated, the Part 100 regulations established a summary type of penalty assessment procedure under which the mine operator charged with a violation of a safety or health standard was served with a proposed penalty assessment order prior to any proceeding to determine whether a violation in fact occurred, and was simultaneously notified that if he failed to protest such penalty assessment within 15 days he would be deemed to have waived his right to protest and to a formal adjudication, and the proposed penalty assessment would become the final assessment order of the Secretary of the Interior. (30 CFR Section 100.4(e)).

The record in the District Court showed that under the Part 100 procedure proposed assessment orders were issued solely on the basis of unproved notices of violation issued by mine inspectors, and without any preliminary determination that the cited violations had in fact occurred. The printed form used in issuing proposed penalty assessment orders contained a "boiler plate" statement that consideration had been given to the six statutory criteria specified in Section 109(a)(1) of the Act for determining the amount of the assessed penalty, but the evidence showed, and the District Court found, that this was indeed not the case, and that the contrary was true. The Court noted that assessment orders "seem to issue forth on a mass production basis from a clerical machinery completely divorced from any genuine process of considered determination as to each case." Appendix B. p. 11b.

In granting summary judgment for the plaintiffs and enjoining the Secretary from utilizing or enforcing the challenged procedures, the District Court held that under Section 109(a), "It is the Secretary's responsibility to see that the statutory requirements are fulfilled

in all cases, even where the operator does nothing." The Court went on to hold that:

> "In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made 'by decision incorporating his findings of fact therein.'" (Appendix B, p. 12b).

Upon appeal by the Secretary, the Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court, and construed the Act as not requiring the Secretary to issue a decision incorporating findings of fact unless the mine operator requests a hearing. In reaching this conclusion the Court relied upon its interpretation of the statutory intent which it drew from the legislative history of the Act. Appendix A, pp. 9a-14a.

At the same time that the Petitioners herein were challenging the Part 100 assessment regulations in the District of Columbia, the Secretary filed suits in the District Court for the Western District of Pennsylvania against three coal mine operators[3] to enforce penalty assessment orders issued under the Part 100 procedures. In those cases the District Court found the assessment orders issued under the Part 100 regulations were invalid and unenforceable and dismissed the Secretary's actions. On appeal by the Secretary to the Court of Appeals for the Third Circuit that Court affirmed the dismissal of these suits, stating:[4]

[3] *Morton v. Delta Mining Co.; Morton v. G.M.W. Coal Co.; Morton v. Edward Mears, et al.* See footnote 4, infra.

[4] *Morton v. Delta Mining Co.*, 495 F.2d 38 (3d Cir., 1974). Printed as Appendix E.

> "The language of the Act would appear to require that, whether or not the operator requests a hearing the assessment *must* be made 'by [the Secretary's] decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted'. The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of Section 109.
>
> "Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested. Appendix E, pp. 6e, 7e. (Emphasis in original).

In *Delta Mining* the Third Circuit also noted that its holding was at odds with the decision of the District of Columbia Circuit in the present case, and commented that "The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior jurisprudence." Appendix E, p. 11e, fn. 30.

REASONS FOR GRANTING THE WRIT

I.

THERE EXISTS A CONFLICT IN DECISIONS OF TWO CIRCUITS ON AN IMPORTANT QUESTION OF LAW

The decision of the District of Columbia Circuit is in direct conflict with the decision of the Third Circuit in

Morton v. Delta Mining Co., supra, on the critical question of whether the Secretary may issue valid and enforceable civil penalty assessment orders without having made the requisite findings of fact respecting the occurrence of a violation and without having made a determination, based on the six statutory criteria, as to the amount of the penalty which is warranted. In view of this direct conflict neither the Petitioners nor the Secretary have a rule of law on which they can rely, and this conflict can only be resolved by this Court. See *Federal Power Commission v. Texaco Inc.*, 377 U.S. 33, 37; 84, S.Ct. 1105, 1108; 12 L.Ed. 2d 112, 115 (1964).

II.

THE COURT BELOW IGNORED PROPER RULE OF STATUTORY CONSTRUCTION

In reaching its decision in this case the Court of Appeals for the District of Columbia Circuit went behind the unequivocal language of Section 109(a) of the Act and proceeded to garner from the legislative history a construction of the statutory language directly opposite to its plain meaning. (See Appendix A, p. 11a).

In *Sea-Land Service, Inc. v. Federal Maritime Commission* 404 F.2d 824 (1968), the Court of Appeals for the District of Columbia Circuit correctly noted the established rule of statutory construction that:

> "Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent. (Citing *United States v. Oregon*, 336 US 643, 81 S. Ct. 1278, 6 L.Ed. 2d 575 (1961)).

In respect to Section 109(a) of the Act there is no ambiguity or lack of clarity which would require resort to the legislative history to determine its meaning, and the plain words used thus constitute the most persuasive evidence of the intent of the legislature. *District of Columbia National Bank v. District of Columbia,* 348 F.2d 808, 810, (3d Cir. 1965) (citing *Chung Fook v. White,* 264 U.S. 443, 44 S.Ct. 361, 68 L.Ed. 781 (1924)).

III.

THE DECISION OF THE COURT BELOW CONFLICTS WITH CONTROLLING PRINCIPLES ENUNCIATED IN DECISIONS OF THIS COURT

The decision of the District of Columbia Circuit is in conflict with principles of administrative law recognized by this Court.

In *Burlington Truck Lines v. United States,* 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed. 2d 207 (1962) this Court held that the powers of an administrative agency must be exercised in accordance with and in the mode prescribed by the statute creating such power, and an agency cannot rightly dispense with any of the essential forms of proceedings which the legislative has prescribed in investing it with the power to act.

In *CAB v. Delta Airlines,* 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed. 2d 869 (1961) the Court held that an attempt by an agency to exercise a power without compliance with the procedural provisions laid down in the statute as to the manner and circumstances of its exercise is a nullity.

Similar rulings were made in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958); *United States v. Chicago, Milwaukee and St. Paul R.R.*, 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023 (1935), and numerous other cases.

IV.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH PRINCIPLES WHICH IT HAS ITSELF FOLLOWED IN PRIOR CASES

The decision of the Court of Appeals for the District of Columbia Circuit in this case is inconsistent with and contrary to the general body of law which that Court has itself established and followed in prior cases. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 596 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied 403 U.S. 923 (1971); *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1972); *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); Station *KFH v. FCC*, 247 F.2d 570 (D.C. Cir. 1957)).

In *Environmental Defense Fund, supra*, the Court held that the Secretary of Agriculture must articulate the criteria he follows in making administrative decisions respecting registration of pesticides. 439 F.2d at 596.

The *Greater Boston* case, *supra*, contains this observation:

> "The function of the Court is to assure that the [administrative] agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." 444 F.2d at 851.

The Court indicated in *D.C. Federation, supra*, that the absence of either findings or an administrative record "simultaneously obfuscates the process of review and signals sharply the need for careful scrutiny." 459 F.2d at 1237-38.

In *Calvert Cliffs, supra*, the Court observed that in requiring responsible agency officials to prepare "detailed statements" covering the environmental impact of certain actions, The National Environmental Protection Act of 1969 "provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own." 449 F.2d at 1114.

Station *KFH, supra*, was similar to the foregoing cases. There the Court refused to accept an agency's summary recitation to the effect that it had considered all of the pertinent matter and had taken appropriate action. 274 F.2d at 572.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1678

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL.

v.

ROGERS C. B. MORTON (SECRETARY OF THE INTERIOR OF THE UNITED STATES) ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided February 11, 1974

Michael Kimmel, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney, *Kathryn H. Baldwin*, Attorney, Department of Justice, and *J. Philip Smith*, Assistant Solicitor, Department of the Interior, were on the brief for appellants. *Arnold T. Aikens* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys, also entered an appearance for appellants.

John L. Kilcullen for appellees.

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge:* Under the Federal Coal Mine Health and Safety Act of 1969 [1] the Secretary of the Interior is charged with enforcing mandatory health and safety standards in the nation's coal mines. Pursuant to this authority the Secretary may assess civil penalties against operators of coal mines in which health and safety violations occur.[2] The present action challenges the procedures adopted by the Secretary to assess these penalties.

Plaintiffs, an association of coal mine operators and various individual coal mine operators, seek an injunction and declaratory relief on the ground that the civil penalty assessment procedures embodied in 30 C.F.R. Pt. 100 violate the procedural requirements of Section 109 (a) (3) of the Act, 30 U.S.C. § 819(a) (3) (1970). The district court granted summary judgment for the plaintiffs and permanently enjoined the Secretary from utilizing or enforcing the challenged procedures.[3] Because we find the Secretary's procedures to be legal under the Act as we interpret it, we reverse.

I

When a coal mine inspector discovers a health or safety violation he delivers a notice of violation to the mine operator.[4] This notice contains "a detailed description

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[1] 30 U.S.C. §§ 801 *et seq.* (1970) (Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 742) [hereinafter referred to as the Act].

[2] 30 U.S.C. § 819 (1970).

[3] National Independent Coal Operators Ass'n. v. Morton, 357 F. Supp. 509 (D.D.C. 1973).

[4] 30 U.S.C. § 814 (1970). The notice of violation requires the mine operator to correct the violation within a specified

period. *Id.* § 814(b). In addition to issuing a notice of violation, if the inspector finds that an imminent danger exists, he may direct that all personnel be withdrawn from the area until the danger is abated. *Id.* § 814(a).

of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard . . . ." [5] For example, a notice of violation submitted to this court by the parties describes the violation as follows:

> [At 12:40 P.M. on December 21, 1971, an] accumulation of float coal dust was present in the No. 3 return entry 3 south off 1 Main West for a distance of about 1,500 feet.[6]

Over 227,000 notices of violation were issued from the effective date of the Act, March 30, 1970, through June 30, 1973.[7]

The Act requires that for each violation of a mandatory health or safety standard the mine operator "shall be assessed a civil penalty by the Secretary . . . ." [8] In view of the immense number of violations, the Secretary promulgated rules and regulations establishing preliminary procedures to be followed in assessing civil penalties.[9] It is these preliminary procedures which are challenged in the present action.

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[5] *Id.* § 814(e).

[6] Jt. App. at 85.

[7] Brief for Appellant at 18 & n.22. There were in excess of 100,000 notices of violations per year.

[8] 30 U.S.C. § 819(a) (1) (1970). The net amount assessed under the Part 100 procedures from January 16, 1971 to March 9, 1973 exceeded $24,500,000. Brief for Appellant at 18 n.23.

[9] 30 C.F.R. Pt. 100 (1973). These procedures were adopted in January 1971, 36 FED. REG. 779-80, and were amended in certain respects in June 1972, 37 FED. REG. 11459-60, 11861-62. Since the entry of the district court's order enjoining the

The regulations provide that after a notice of violation is issued it is reviewed by an Assessment Officer who determines "the liability of the operator . . . for a civil penalty and the amount of penalty to be proposed." [10] The Act prescribes six factors which the Secretary must consider in determining the amount of the penalty,[11] and the Secretary's regulations specifically require the assessment officer to consider all relevant circumstances, including the six factors specified in the Act.[12]

After reviewing the notice of violation and determining an appropriate amount for a civil penalty, the as-

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preliminary procedures, such procedures have been suspended, 38 FED. REG. 10085 (April 24, 1973), and all penalty assessment cases are being processed under the formal hearing procedures of 43 C.F.R. §§ 4.540 *et seq.*, as revised, 38 FED. REG. 10086-87 (April 24, 1973).

[10] 30 C.F.R. § 100.3(a) (1973).

[11] In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 819(a)(1) (1970).

[12] 30 C.F.R. § 100.3(c) (1973). *See also id.* § 100.2(a).

Subsequent to the district court's injunction, the Secretary amended the assessment procedures to utilize an "assessment formula." 38 FED. REG. 10086 (April 24, 1973). This formula calculates the appropriate penalty in a particular case by assigning numerical values to each of the six statutory factors. *See* Brief for Appellant at 13-17. Although the Secretary has represented to this court that the assessment formula will be retained even if the district court's judgment is reversed, we need not consider the assessment formula in deciding the present case. *Id.* at 12, 13.

sessment officer serves a Proposed Order of Assessment upon the mine operator. This proposed assessment order refers to the particular violation, specifies the amount of the proposed penalty,[13] and advises the mine operator that he has 20 days from receipt of the order either to protest the proposed penalty or to petition for hearing and formal adjudication.[14] If the operator fails timely to protest or request a formal hearing, "he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior." [15]

In the event that the operator protests the proposed order, the assessment officer may reconsider in light of the operator's arguments and redetermine, amend or reissue the proposed order.[16] Upon amendment or reissuance of the proposed order, the operator again has 20 days to accept or reject it in whole or in part, and to request a hearing and formal adjudication.[17] If the operator does not file a timely request for a hearing and formal adjudication, the amended or reissued proposed assessment order becomes the final assessment order of the Secretary.[18]

In the event that the operator does request a hearing,[19]

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[13] 30 C.F.R. § 100.3(b)(2) (1973).

[14] *Id.* § 100.3(d). The operator may protest the order either partly or in its entirety.

[15] *Id.* § 100.3(e). The assessment officer may extend the time allowed for protest. *Id.* § 100.3(g)(1).

[16] *Id.* § 100.3(g)(2), (3).

[17] *Id.* § 100.3(h).

[18] *Id.*

[19] The petition for hearing and formal adjudication must be in writing and must include a list of the violations in issue.

the hearing is de novo [20] and the Secretary has the burden of proving by a preponderance of the evidence that the violation occurred and that the penalty is warranted.[21] The hearing examiner must render a decision based solely on the record of the hearing,[22] incorporating findings of facts and conclusions of law.[23] Thus, throughout the preliminary procedures for assessing civil penalties, formal adjudication is available to a mine operator who either contests the occurrence of the violation or protests the amount of the proposed penalty.

II

Plaintiffs contend that these preliminary procedures violate the procedural requirements of Section 109(a)(3) of the Act which provides as follows:

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43 C.F.R. § 4.541(a) (1972). Alternatively, the operator may attach to his petition a copy of the final proposed assessment order which clearly indicates the violations at issue. *Id.* § 4.541(b). Within 30 days of filing his petition, the operator must file a short and plain statement of the factual and legal issues, as well as a brief statement concerning the applicability of the six statutory criteria of 30 U.S.C. § 819(a)(1). *Id.* § 4.544(a).

[20] 30 C.F.R. § 100.5(b) (1973).

[21] 43 C.F.R. § 4.587 (1972).

[22] *Id.* § 4.24.

[23] *Id.* § 4.593. The hearing examiner's decision is reviewable by the Board of Mine Operations Appeals. 43 C.F.R. §§ 4.1(4), 4.500(a)(2), 4.600 (1972).

If the formal adjudication is adverse to the operator he may obtain de novo judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. § 819(a)(4) (1970). The same judicial review is available where the operator fails to request a hearing and allows the proposed assessment order to become final.

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

30 U.S.C. § 819(a)(3) (1970). Plaintiffs argue that this section requires a formal decision incorporating findings of fact in every case regardless of whether a mine operator waives his right to a formal hearing by failing to file an objection to the proposed assessment order. If plaintiffs' interpretation of the Act is correct, then the Secretary's preliminary procedures for assessing civil penalties are illegal because, absent a request for formal adjudication, the final assessment order issues without a decision which complies with the formal requirements of the Administrative Procedure Act.[24]

Section 109(a)(3) is logically capable of two different constructions. Plaintiffs would read the statute, even where no hearing is requested by the operator, as follows: "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."

The Secretary maintains that the requirement for a decision must be read in context and that the section as a whole describes the formal adjudicative process which

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[24] 5 U.S.C. §§ 554, 557 (1970); *see* notes 25-28 *infra* and accompanying text.

is available to a mine operator upon his request. The Act clearly requires a formal decision whenever disputed issues are contested in a hearing. However, according to the Secretary's interpretation, the requirement for a formal decision of the character and extent for which appellant argues, is linked to the statutory guarantee of an opportunity for a hearing. Under this interpretation a formal decision is not required unless the mine operator takes advantage of that opportunity by requesting a hearing.

In deciding which is the proper interpretation it is helpful to identify the nature of the decision contemplated by the Act. The Act requires more than an "act of deciding." [25] The decision described in Section 109(a)(3) parallels the decision requried by the Administrative Procedure Act (hereinafter APA) after a formal hearing has been conducted. The APA specifies that a decision following a hearing must include "(A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof." [26] A decision under Section 109(a)(3) must include (1) findings on the material issues of the occurrence of a violation and the amount of the penalty, and (2) an order requiring that the penalty be paid.[27] This similarity to a formal APA decision suggests that when a decision is required under Section 109(a)(3), it must contain "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." [28]

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[25] WEBSTER'S NEW INTERNATIONAL DICTIONARY 860 (2d ed. unabr. 1961).

[26] 5 U.S.C. § 557(c) (1970).

[27] 30 U.S.C. § 819(a)(3) (1970).

[28] Automotive Parts & Accessories Ass'n. v. Boyd, 132 U.S. App.D.C. 200, 207, 407 F.2d 330, 337 (1968).

Plaintiffs would interpret the Act to require this kind of formal decision even though the mine operator wilfully chooses not to request a hearing on the proposed penalty. However, once given notice of his right to object, the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed. As the district court pointed out, in the absence of a request for a hearing the Secretary may act on the information available to him and need not adduce evidence for the other side.[29] Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order.

In situations where a statute prescribes a hearing prior to agency action the courts have held that the agency need not conduct a hearing if no disputed issue exists.[30] "In such situations, the rationale is that Con-

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[29] 357 F.Supp. at 513.

[30] FPC v. Texaco, 377 U.S. 33, 39-44 (1964); Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n., 356 U.S. 282, 287 (1958); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Dyestuffs & Chemicals, Inc. v. Flemming, 271 F.2d 281, 286-87 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); *see* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-22 (1973).

In *United States v. Storer Broadcasting Co., supra,* the FCC had denied a license application without a hearing because the application established on its face a violation of a substantive FCC rule. Even though the governing statute required a "full hearing" before denial of an application, the Supreme Court concluded that where an application clearly contravened substantive rules, a hearing was unnecessary unless the application

> set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications

gress does not intend administrative agencies to perform meaningless tasks." [31] Similarly, as we interpret Section 109(a)(3), the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing.

If the operator wants to contest the alleged violation or if he believes that his particular circumstances warrant a lesser penalty, he need only request a hearing and briefly describe the issues in dispute. Such a request puts the Secretary to his burden in a hearing of proving both the violation and the appropriateness of the penalty. Following the hearing the Secretary has the statutory responsibility for preparing a "decision incorporating his findings of fact therein." [32]

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that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Id. at 205. Therefore, the statutorily prescribed "full hearing" was only required where the applicant demonstrated the existence of a disputed issue.

A similar situation exists in the the present case. A notice of violation issued to a mine operator evidences a violation of the substantive health and safety standards established by Congress, and the proposed penalty assessment order is based upon the notice of violation. The operator is advised that he has the right to request formal adjudication and he is fully advised of the consequences of a failure to request such adjudication. If any mine operator objects to the notice of violation or to the proposed penalty and desires a formal decision, he need only request formal adjudication. As in the *Storer Broadcasting* decision, "the way for review is open." *Id.*

[31] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

[32] We thus interpret the Act to permit any mine operator who desires a formal decision on the alleged violation or the amount of the proposed penalty to obtain such decision merely by indicating his objection and making a simple request for a hearing. By failing to request a hearing he waives his

III

The legislative history of Section 109(a)(3) supports the foregoing interpretation of the statute with respect to the decision requirement. Both the Senate and House bills, in the form in which each bill passed its respective house, required a formal decision only after a hearing had been conducted. The House bill provided:

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such operator an opportunity for a hearing and, *in accordance with the request*, determine by decision whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised.[33]

The Senate bill read as follows:

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title 5 of the United States Code shall apply to any such hearing and decision.[34]

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right to formal adjudication. This procedure is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgment entered against him. FED. R. CIV. P. 55.

[33] H.R. 13950, 91st Cong., 1st Sess. § 109(b) (1969) (115 CONG. REC. 32064) (emphasis added). Most of the Act's legislative history is reprinted in a one-volume committee print. HOUSE COMM. ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY, FEDERAL COAL MINE HEALTH AND SAFETY ACT (1970) [hereinafter cited as Legislative History]. H.R. 13950 § 109(b) appears in Legislative History at 932.

[34] S. 2917, 91st Cong., 1st Sess. § 808(a)(3) (1969) (115

The italicized language demonstrates that under both the Senate and the House bills the requirement for a formal decision was clearly tied to the operator's request for a hearing.

Following passage in both houses, the respective bills were referred to a Conference Committee on the disagreeing votes between the two houses. Although the Conference Committee "adopt[ed] the Senate provision," [35] the Committee deleted the language italicized above. Thus the italicized language did not appear in Section 109(a)(3) of the Conference bill which eventually was enacted. The only explanation for this section appears as follows in the Conference Report:

> Both the Senate bill and the House amendment provided an *opportunity* for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any notice or order involving a violation of a standard.[36]

We do not believe that the Conference Committee's deletion of the italicized language from the Senate bill reflected an intent to alter the procedural requirements of the bill. The Committee's concern was that the Act afford an *opportunity* for formal adjudication under 5 U.S.C. § 554 and the Conference Report emphasized that "[b]oth the Senate bill and the House amendment provided an *opportunity* for a hearing . . . ." [37] If, as plain-

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CONG. REC. 28256, Legislative History at 546) (emphasis added).

[35] H.R. REP. No. 91-761, 91st Cong., 1st Sess. 71 (1969) (Legislative History at 1033).

[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added).

tiffs suggest, the Committee intended to alter the bill's procedural requirements to require a formal decision where the operator did not avail himself of the opportunity for formal adjudication, one would expect the Committee to mention the change in the Conference Report. Their failure to do so, together with their statement that they adopted the Senate provision, indicates that the Committee deleted the italicized language because they considered it surplusage.

The district court expressed concern that the preliminary procedures adopted by the Secretary "would shift the initial burden to the mine operator charged with the violation," and that "Congress chose not to adopt such an approach when it was expressly proposed in the 'administration bills' of the proposed legislation." [38] We do not share the district court's concern. Requiring the operator to request a hearing and briefly describe the issues in dispute does not impose a significant burden upon the operator. At the hearing the burden remains with the Secretary to prove his case by a preponderance of the evidence.[39]

Furthermore, the legislative history does not reflect congressional disapproval of the procedures adopted by the Secretary. Although the administration bills did specify a procedure similar to that challenged here, the broad procedural requirements ultimately adopted are not inconsistent with the more detailed provisions of the administration bills.

The administration bills, as well as the bill approved by the House, specified that a mine operator must request a hearing in writing within 30 days after receipt of an assessment order.[40] The corresponding section of the Sen-

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[38] 357 F. Supp. at 512.

[39] 43 C.F.R. § 4.587 (1972).

[40] The pertinent provision of the bill as approved by the House is set forth above. Note 33 *supra* and accompanying

ate bill afforded the mine operator an opportunity for formal adjudication but did not detail the specific procedures for requesting a hearing.[41] The statement in the Conference Report, set forth above,[42] indicates that the Conference Committee considered the only significant difference between these sections of the bills to be the reference in the Senate bill to the Administrative Procedure Act, and that this slight difference was the reason it adopted the language of the Senate bill. In view of the explanation provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills.

IV

We conclude that the Act does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including a formal decision. The Act does not require a formal decision where no hearing is requested and no issues are in dispute.

Reversed.

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text. The corresponding provisions of the administration bills were virtually identical to the provision in the bill approved by the House. *See* S. 1300, 91st Cong., 1st Sess. § 113(b) (1969); H.R. 7976, 91st Cong., 1st Sess., § 113(b) (1969).

[41] Note 34 *supra* and accompanying text.

[42] Note 36 *supra* and accompanying text.

APPENDIX B

NATIONAL INDEPENDENT COAL OPERATORS ASSOCIATION et al.

v.

Rogers C. B. MORTON, Secretary of the Interior et al.

Civ. A. No. 397-72.

United States District Court,
District of Columbia.

March 9, 1973.

Action was brought by coal operators' association challenging procedures adopted by Bureau of Mines in assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act. On defendant's motion to dismiss or, in the alternative, for summary judgment and on plaintiff's cross motion for summary judgment, the District Court, Aubrey E. Robinson, Jr., J., held that assessment of civil penalties by mailing to affected operator a proposed order of assessment listing only the violation and amount of penalty assessed, with operator's failure to object resulting in automatic and unconsidered final order against him, is a procedure not authorized by Act. In addition, the Court held that Secretary was required to make findings of fact as to occurrence of a violation and amount of a penalty which was warranted regardless of whether the operator had exercised his opportunity for a hearing.

Defendant's motion denied; plaintiff's motion granted.

1. Labor Relations ⇦13

In assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act, the Secretary of the Interior must make findings of fact as to the occurrence of a violation and the amount of the penalty which is incurred, regardless of whether the operator has exercised his opportunity for a hearing. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

2. Labor Relations ⇦13

Before assessment of a civil penalty for violation of health and safety standards under Federal Coal Mine Health and Safety Act can become final the Secretary of the Interior must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to amount of the penalty which is warranted, and (3) make express determinations that violation did occur; such express determinations are to be made by a decision incorporating his findings of fact therein. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

3. Labor Relations ⇦13

Secretary of Interior may employ informal, preliminary procedures in assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act; however, if those procedures do not resolve the matter, official action toward entry of a final assessment order by the Secretary can be taken only in compliance with the statutory requirements. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

4. Labor Relations ⇦13

In determining whether to assess civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act, the Bureau of Mines is entitled to act on the information before it, provided the affected operator has been apprised of that information and given the opportunity to dispute or supplement it; at such point findings can properly be made on a considered evaluation of available information; an operator cannot fully turn a deaf ear to the proceedings and expect that the Bureau will be required by the court to develop a record on both sides as fully as if the operator had participated by counsel throughout. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

5. Labor Relations ⇐13

Assessment of civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act by mailing to affected operator a proposed order of assessment listing only the violation and amount of penalty assessed, with operator's failure to object resulting in automatic and unconsidered final order against him, is a procedure not authorized by Act. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

John L. Kilcullen, Gall, Lane, Powell & Kilcullen, Washington, D. C., for plaintiffs.

Harold H. Titus, Jr., U. S. Atty., Arnold T. Aikens, Robert M. Werdig, Jr., Asst. U. S. Attys., Washington, D. C., for defendants.

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, Jr., District Judge.

This action involves a challenge to the procedures adopted by the Bureau of Mines, United States Department of the Interior, in assessing civil penalties for violation of health and safety standards under the Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, 30 U.S.C. § 801 et seq. Specifically, Plaintiffs claim that the Secretary and his subordinates have violated, and continue to violate, the requirements of Section 109(a)(1) and (3) of the Act, 30 U.S.C. § 819(a)(1) and (3). Subsection 109(a)(1) requires that in determining the amount of civil penalties to be assessed under the act the Secretary "shall consider" six factors: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the operator's business; 3) whether the operator was negligent; 4) the effect of the penalty on the operator's ability to continue in business; 5) the gravity of the violation, and 6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. Subsection 109(a)(3) requires that a civil penalty shall be assessed by the Secretary

> only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . .

This is a question of first impression as to the construction and application of these provisions. The matter is now before the Court on Defendant's Motion to Dismiss or, in the alternative, for summary judgment, and on Plaintiff's cross-motion for Summary Judgment.

At present, when a Federal Mine Inspector finds a violation of the health or safety standards of the act, a "notice of violation" is issued to the Bureau of Mines in Washington. Based solely upon that notice of violation an assessment officer prepares and issues a "Proposed Order of Assessment" which lists the penalty to be assessed and recites verbatim that the six statutory factors have been considered. Upon receipt of the Proposed Order of Assessment, which lists only the violation and the amount of the penalty assessed, the operator may file a protest against either the finding of a violation or the appropriateness of the penalty, or both. Upon protest the Assessment Officer may reconsider his initial proposed assessment in light of information and data submitted by the operator and may vacate, amend, or affirm the initial Proposed Order. Vacating the order, of course, ends the matter. If the order is either amended or affirmed the operator may then demand a public hearing, to be conducted under the Administrative Procedure Act, 5 U.S.C. § 554. If the operator does nothing in response to the Proposed Order of Assessment, after fifteen (15) working days, "he shall be deemed to have waived his right of protest, including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order

of the Secretary of the Interior." 30 C.F.R. § 100.4(e). Part 100 of Title 30 of the Code of Federal Regulations contain the only written guidelines governing the penalty assessment process. 30 C.F.R. § 100.4(c) requires that in determining the amount of penalty to be initially proposed the assessment officer will consider all relevant circumstances including the six factors required by statute to be considered. Appendix A to Part 100 contains a penalty schedule listing suggested penalty ranges for various types of violations, albeit with a proviso that particular circumstances of a case might warrant variation from the listed schedule. There are no written guidelines within the assessment officer to guide the assessment officers in evaluation or application of the six statutory criteria for penalty assessment. When no protest is offered to a Proposed Order a form entitled "finding of fact" is inserted in the appropriate case file in the assessment office. That form recites that the assessment officer has found as fact that the cited violation did occur. From the effective date of the Act, March 30, 1970, through June 30, 1972, over 96,000 orders of assessment were issued by the Assessment Office of the Bureau of Mines.

Dêfendants here contend that the process by which the initial Proposed Order of Assessment is issued is "basically informal and preliminary in nature and provide(s) the coal mine operator with the opportunity to resolve the question of a civil penalty without more formal and time-consuming adjudicatory hearing procedures." (Defendants Br. at 4). The Court has difficulty with this characterization, however, for if the mine operator does nothing the Proposed Order ripens into a final order, enforceable in accord with the provisions of the statute. Under the statute, all final orders must have been prepared and issued in accord with the requirements of subsections 109(a)(1) and (3), i. e. the six statutory factors must have been considered in determination of the penalty to be assessed, the operator charged with the violation must have been given an opportunity for a public hearing, and the Secretary must have determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. Bureau regulations, 30 C.F. R. § 100.4(c), recognize that the six statutorily prescribed factors must be considered even in "determining the amount of the *proposed* penalty." The Bureau contends that these factors are in fact considered in the initial assessment process, despite the absence of any written guidelines within the Bureau

for evaluation and application of the factors and despite the absence of any record of their evaluation and application to a given case in the individual case file. In short, without any guidelines or restrictions, and without making any record, the assessment officer "considers" the factors subjectively, in a virtual vacuum. Approximately 100,000 such assessments were thus "considered" over two years. These are strong indications that the proposed order of assessment is anything but a considered determination. Since a factual issue might be raised on this point, however, it is unnecessary to pursue the point further in determining the present motions.[1]

[1] It is undisputed that the operator charged with a violation is given an opportunity for a hearing. Defendants would have the court read the statutory language as also requiring only an "opportunity" for a determination by

1. As to the substantial inadequacies in the penalty assessment program, even from a purely administrative viewpoint, see Report to the Conservation and Natural Resources Subcommittee on Government Operations, House of Representatives; Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969 (B-170686), General Accounting Office, July 5, 1972.

the Secretary, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted. In the Court's view, however, the statute absolutely requires such a determination by the Secretary in all cases, not merely the "opportunity" for a determination. By the most basic rules of statutory construction the word "opportunity" in Section 109(a)(3) relates only to the public hearing while the remainder of the Section requires that an assessment shall be made "only after . . . the Secretary has determined, by decision . . ." In short, in each case, whether the operator has exercised his opportunity for hearing or not, the Secretary must make findings of fact as to the occurrence of a violation and the amount of the penalty which is warranted. The only purpose for such a statutory provision is to ensure a considered determination by the Secretary in every case both as to the occurrence of a violation and as to the appropriate penalty. To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a "decision, incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . ." The present forms contain no findings as to the penalty other than the amount to be imposed.

The system thus required by Congress may be an administrative burden on the Bureau of Mines because of the volume of cases, the necessity for individual consideration of each case, and staff limitations. Nevertheless it is not for this Court to rewrite the statute to suit the convenience of its administrators. For whatever reasons, Congress wrote into this statute the procedural requirements here in issue. It is clear to this Court that they have not been complied with. As Plaintiffs contend, assessment orders seem to issue forth on a mass production basis from a clerical machinery completely divorced from any genuine process of considered determination as to each case.

[2] This process of consideration and determination is a burden which Congress has placed on the administrators of the Act, to be fulfilled in every case. Section 109(a)(3) does not allow for defaults against the operator. It does the Bureau of Mines little use, therefore, to contend that the "opportunity" for such considered determinations will suffice. This would shift the initial burden to the mine operator charged with a violation. Congress chose not to adopt such an approach when it was expressly proposed in the "administration bills" of the proposed legislation. (S.1300 and H.R. 7976; 91st Congress). It is the Secretary's responsi-

bility to see that the statutory requirements are fulfilled in all cases, even where the operator does nothing. In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made "by decision incorporating his findings of fact therein".[2]

2. An adequate administrative procedure under the act, as this Court conceives it, would be:
1.) Notice to operator of violation, spelling out the specifics of the violation alleged by the mine inspector.
2.) Notice of proposed penalty assessment, spelling out the six statutory criteria *as applied to this violation*, e. g. upon finding that this is a major operation (xxxx tons per day or year); that the violation is the most serious (imminent danger withdrawal order—improper roof support); that the violation appears willful (or grossly negligent, negligent, etc.) and that this is the 10th such violation by this operator and that the operator has (not) made any effort to correct the violation.
3.) Opportunity to object to the proposed findings as to the violation and/or as to the appropriate penalty.
4.) Opportunity for formal adjudication and formal adjudication, if requested.

[3–5] This is not to say that the Secretary may not employ informal, preliminary procedures if he deems that advisable. It is to say that if those procedures do not resolve the matter, official action toward entry of a final assessment order by the Secretary can be taken only in compliance with the requirements outlined herein. Nor is it to say that the operator can fully turn a "deaf ear" to the proceedings and expect that the Bureau of Mines will be required by the Court to develop a record on both sides as fully as if the operator had participated by counsel throughout. The Bureau is entitled to act on the information before it, once the operator has been apprised of that information and given the opportunity to dispute or supplement it. At that point findings can properly be made on a considered evaluation of available information. This is a far cry from present procedures, where the operator receives only the form notice of violation and form notice

5.) Determination by the Secretary, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted.

This is intended as an illustrative example only. There may be other approaches which comport with the statutory requirements. This approach ensures consideration of the facts, both as to the violation and the penalty, by the Bureau by requiring that the rationale for decision be set forth.

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of the amount of penalty proposed, with failure to object resulting in an automatic and unconsidered final order against him. Under present procedures there is every possibility that an unconsidered determination as to violation and/or penalty will be entered as a "finding" and become a final order if the operator does nothing. Under the present procedures the operator had no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty. The initial burden at present is upon the operator to show why a possible arbitrary finding of violation or penalty is not appropriate, rather than being upon the Secretary to make a considered determination of violation and appropriate penalty. When the Secretary initially makes a considered determination and informs the operator of his bases, both the Secretary and the operator have a starting point from which to go forward in implementing the Coal Mine Health and Safety Act.

The Secretary, the mine operators, the miners and the public all have important interests in the effective enforcement of the Federal Coal Mine Health and Safety Act. The Congress produced an important statute, containing many varied technical and procedural provisions,

some of which are undoubtedly the products of legislative compromise. Nevertheless, all of those provisions are controlling upon the Bureau of Mines, the mine operators and the Courts. Today's decision need not hamper enforcement. Indeed if fully implemented by the Secretary it can improve and make more effective enforcement efforts which have in the past proceeded, sometimes arbitrarily, under a difficult administrative mechanism.

Upon the above considerations, and upon consideration of the entire record herein, it is this 9th day of March, 1973,

Ordered that Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment be and hereby is denied, and it is

Further ordered that Plaintiffs' Motion for Summary Judgment be and hereby is granted.

APPENDIX C

PENALTIES

SEC. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any
792. other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

* * *

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be
384. subject to section 554 of title 5 of the United States Code.

APPENDIX D

Title 30—MINERAL RESOURCES

Chapter I—Bureau of Mines, Department of the Interior

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

PART 100—CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter O of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100, as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maximum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry, Part 100 shall become effective on the date of its publication in the FEDERAL REGISTER (1-16-71).

FRED J. RUSSELL,
Under Secretary of the Interior.

JANUARY 14, 1971.

Sec.
100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.
Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*—(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners

could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b) (1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g) (1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i) (1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess penalty with

the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000–$10,000
B. Other Withdrawal Orders	$1,000–$5,000
C. Serious Violations	$100–$1,000
D. Nonserious Violations	$25–$500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$25–$250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc.71-748 Filed 1-15-71;9:47 am]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Dept. of Interior

v.

DELTA MINING, INC.

United States of America,
Appellant in No. 73-1752

ROGERS C. B. MORTON, Secretary of the INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR

v.

G. M. W. COAL COMPANY, INC.

United States of America,
Appellant in No. 73-1753

ROGERS C. B. MORTON, Secretary of Interior, UNITED STATES DEPT. OF THE INTERIOR

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America,
Appellant in No. 73-1848

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil Nos. 73-857, 72-890, 72-928

Argued January 10, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division

RICHARD I. CHAIFETZ
Attorney
Department of Justice
Washington, D.C.

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Attorney for Edward Mears, et al.

OPINION OF THE COURT

(Filed March 20, 1974)

ADAMS, *Circuit Judge*

The question on this appeal is whether, under the Federal Coal Mine Health and Safety Act,[1] the Secretary of Interior may assess civil penalties against mine operators without making and publishing factual findings. The district court, in which the Secretary sought enforcement of assessment orders against the defendant mining companies,[2]

1. 30 U.S.C. §§ 801 *et seq.*

2. Separate enforcement proceedings were brought against G.M.&W. Coal Co., Inc., Delta Mining, Inc. and Edward Mears, d/b/a M. Y. Coal Company. The cases involve identical issues, and so the appeals were consolidated in this court. The several appellee coal companies are referred to herein collectively, as "defendants."

held that the orders were invalid because of the absence of such findings, and the Secretary appealed.

The Act was passed in 1969 to "protect the health and safety of the Nation's coal miners."[2a] At various times during 1971, inspectors of the Bureau of Mines, Department of Interior, entered and inspected the coal mines operated by the various defendants, seeking to determine the extent of compliance or non-compliance with the Act, and with the regulations promulgated thereunder.[3] During the course of these visits the inspectors detected a number of violations of the Act or the regulations. In each such instance, an inspector served the defendant in question with a notice of the infraction. Each notice stated that the particular violation had to be abated by a certain date. On the date set for abatement, the inspector returned to the mine and, upon determining that the violations had in fact been abated, furnished the defendant with a notice to that effect.

After the abatement of each violation and the notification of the defendant involved, the local office of the Bureau of Mines sent copies of the notices of violation and abatement to the Bureau's central office in Washington, D.C. There an Assessment Officer reviewed the various notices and sent proposed penalty assessment orders to the defendants.[4]

The proposed penalty assessment orders informed each defendant that the Assessment Officer, after giving "due consideration" to certain statutory criteria, intended to assess civil penalties in various amounts; that the defendants could protest the assessments in writing; and that the defendants had a right, secured by statute, to request hearings. Each defendant protested the orders.[5] However, the

2a. 30 U.S.C. § 801(g)(1).

3. 30 C.F.R., Ch. 1, subch. 0.

4. In most instances, the Assessment Officer consolidated several violations into one proposed penalty assessment order.

5. When a protest is made to a proposed order, the Assessment Officer may either vacate, modify or affirm the proposed order. If the proposed order is vacated, the proceeding ends there; if it is modified or affirmed, the violator has the right to seek a hearing, which is held at a location as near as possible to the coal mine involved.

Assessment Officer did not consider that a reduction in the size of the penalties was called for, and he accordingly notified the defendants of his affirmance of the proposed orders.

The defendants were also notified, upon affirmance of the proposed orders, that they had 15 days in which to request a hearing, and that upon their failure to do so within the prescribed time the proposed orders would become the final orders of the Secretary. No hearings were requested and the final orders of the Secretary were entered. When the defendants failed to pay the assessments set forth in the final orders, this action for enforcement was brought in the district court.[6]

Section 109(a)(3) of the Act[7] provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

Section 109(a)(1)[8] enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether

6. Section 109(a)(4) of the Act, 30 U.S.C. § 819(a)(4), provides for actions in the district courts to enforce penalty assessment orders.

7. 30 U.S.C. § 819(a)(3).

8. 30 U.S.C. § 819(a)(1).

the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The proposed orders of assessment which the defendants received from the Assessment Officer were on preprinted forms which recited, in some instances, that the six factors set out in the statute had been considered.[9] The final orders entered by the Secretary did not mention the six statutory criteria at all, but merely set forth the Secretary's finding that a violation "did, in fact, occur."[10] The defendants contend, and the district court agreed, that in omitting from the final orders express findings of fact relating to the statutory criteria for determining the amount of the penalty, and so providing no assurance of any considered application of these criteria, the Secretary failed to satisfy the requirements of section 109(a)(3).

The Secretary counters that the language of that section, requiring a "decision incorporating his findings of fact therein," applies only when a defendant has requested an oral hearing, and that when, as here, the Secretary makes a "decision" without any hearing, it is unnecessary under the statute to include any findings of fact.[11] We reject this contention and affirm the district court's grant of summary judgment in favor of the defendant mine operators.

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9. One proposed order lists, as having been considered, the six criteria of section 109(a)(1). Some of the others merely state that consideration has been given to "all available information, including the gravity of the violation."

10. The "finding" that a violation "did in fact, occur,"—which is required under section 109—was originally made by the Assessment Officer. Curiously, the Assessment Officer did not make the finding of violation, in some cases, until several months after the entry of the proposed orders of assessment.

11. The Secretary characterizes the entry of a final order after failure of the violator to request a hearing as a type of "default judgment," and argues that since the operator has willingly forfeited his "day in court," he will not be heard to object to the absence of findings. This reasoning is appealing but, as will be shown, not applicable.

We note that, in ordering penalty assessments without making express findings, the Secretary was acting pursuant to, and in apparent conformity with, the pertinent Regulations of the Department of Interior.[12] Regulation 100.4(h)[13] provides that once a proposed order of assessment has been made, the operator charged shall have 15 days in which to accept such order of the Assessment Officer or to seek a "formal adjudication." Acceptance, or failure to request an adjudication, results under the Regulation in the proposed order becoming "the final assessment order of the Secretary." Thus, the Regulations appear to contemplate the very procedure that was utilized here: a proposed order became final without the Secretary himself making findings on the question of penalty amount.[14] The question before us then, narrows to whether Regulations themselves, as implemented, were consistent with the requirements of the Coal Mine Health and Safety Act.

As noted above, the Act provides that a civil penalty may be assessed only after the operator "has been given an opportunity for a public hearing." The language of the Act would appear to require also that, whether or not the operator requests a hearing, the assessment *must* be made "by [the Secretary's] decision incorporating his

---

12. 30 C.F.R. Pt. 100, effective January 14, 1971. The Part 100 Regulations were amended in some small details on June 15, 1972, and were indefinitely suspended on April 24, 1973. *See* 38 Fed. Reg. 10085, 4/24/73. The references in this opinion are to the Regulations in force between January 14, 1971 and June 15, 1972.

13. 30 C.F.R. §100.4(b). There are other Interior Regulations (30 C.F.R. §301.50, now 43 C.F.R. Part 4) dealing with penalty assessments, the relevance or validity of which we do not pass upon here.

14. It is apparent that the "findings" of the Assessment Officer on the issue of penalty amount, where made, were little more than *pro forma* recitations that the pertinent statutory criteria had been considered. *See* Note 7, *supra*, and accompanying text. In view of the realities of the penalty assessment procedure, we reject the contention that the "findings" as to penalty amount set out in some of the proposed orders were the sort of findings contemplated by section 109. Mere recitation that the statutory criteria for gauging penalty amounts have been given "due consideration" will not convince us "that the agency has . . . really taken a 'hard look' at the salient problems and has . . . genuinely engaged in reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).

findings of fact therein, that a violation did occur and the amount of the penalty which is warranted." The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of section 109.

Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted.[15] There is not a modicum of evidence in the reports from either House of Congress,[16] nor in the Conference Committee report on the compromise bill that became section 109,[17] that would indicate an intent to dispense with findings of fact where no hearing is requested.

Another consideration, apparent on the face of section 109, tends to indicate that findings are required when a violator does not seek a hearing as well as when he does. When a hearing is requested, the section 109 triggers the application in that proceeding of section 5 of the Administrative Procedure Act[18] which, by incorporating section 8 of the APA,[19] requires that the final decision of the Secretary be accompanied by findings. Thus the language in section 109 itself requiring findings would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held. While duplication and repetition in statutory language are certainly not unheard of, it would seem a salutary rule to avoid reading the terms of a statute as mere surplusage in the absence of some proof that they were so intended. Lacking such proof here, we conclude that Congress intended *every* final

15. Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. *See* Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

16. *See* H. Rep. 91-563, 91st Cong., 1st Sess., and S. Rep. 91-411, 91st Cong., 1st Sess. The documents are included in Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, at pp. 569, 93, respectively.

17. *See* H. Rep. 91-781, 91st Cong., 1st Sess.

18. 5. U.S.C. § 554.

19. 5 U.S.C. § 557.

assessment order of the Secretary to be accompanied by findings of fact.[20]

Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite.[21] Thus, thought flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, "we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion."[22] Judicial review of a final administrative determination is heralded as a right,[23] and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings.[24]

Though it might not be beyond Congress' power to provide for the entry by the Secretary of penalty assessment orders without findings of fact, such a provision would run against the grain of much of our administrative jurisprudence. The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such find-

20. The Secretary also mounts a semantic argument against the district court's construction of the statute, by asserting that the word "therein" in section 109 refers to the *hearing*, and not to the "decision" of the Secretary. Thus, he claims, when no hearing is held, there can be no "findings of fact therein." Since the word "decision" follows "hearing" in the statute, the most natural and probable referent of "therein" is "decision," not "hearing." Words in statutes ordinarily should be accorded their most common, everyday meanings. *See, e.g.*, McBoyle v. United States, 278 U.S. 41, 48 (1928). Nor can we fail to note that section 109 makes a second use of the word "therein," the referent of which is clearly "decision" and not "hearing." *See* text accompanying note 7, *supra*.

21. *See* Note, *Administrative Findings Under Section 8(B)* [of the APA], 51 Va. L. Rev. 459, 462-64 (1965); K. C. Davis, Discretionary Justice, ch. VI (1969).

22. Environmental Defense Fund, Inc. v. Ruckleshaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

23. *See* PBW Stock Exchange, Inc. v. Securities and Exchange Comm'n, 485 F.2d 718, 750 (3d Cir. 1973) (*dissenting opinion* of Adams, J.).

24. *See* Environmental Defense Fund, Inc. v. Ruckleshaus, *supra*, 439 F.2d at 598: "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions." *See also* K. C. Davis, *supra*, at 103-106.

ings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid.[25]

In so holding, we observe that the Bureau of Mines has not, to date, established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines has led the Comptroller General, in a report on the Bureau of Mines,[26] to state that:

> "We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in [400] sample cases.
>
> • • •
>
> ". . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty." [27]

Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount.

25. As noted in Note 9, *supra*, the Part 100 Regulations have now been indefinitely suspended.

26. Report by the Comptroller General to the Conservation and Natural Resources Subcommittee, House Committee on Government Operations, entitled "Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969" (July 5, 1972).

27. *Id.* at 25-26.

We are in full sympathy with the goals and spirit expressed in the Coal Mine Health and Safety Act, and we have listened with concern to the Secretary's claim that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions. Yet, we do not consider it appropriate to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act. Though the attainment of safe, reasonably healthy conditions in the coal mines is a commendable statutory objective, so too is the assurance that no one, be he miner or coal magnate, be treated arbitrarily or discriminatorily in any administrative proceeding.

Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not worsen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessments by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings.

We are aware that, only recently, the District of Columbia Circuit reached a conclusion concerning the Act that is at odds with our holding in this case. In National Independent Coal Operators' Ass'n v. Morton,[28] that court reasoned that "the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor

28. No. 73-1678 (D.C. Cir., Feb. 11, 1974).

disagree with the appropriateness of the specific penalty proposed," and that "[w]here no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order."[29]

At least two considerations serve to distinguish the cases before us from that apparently confronting the District of Columbia Circuit in *National Independent*. First, in the cases before us, the defendant operators' failure to request a hearing in no way suggests that the appropriateness of the penalty amount went undisputed. In each instance, the operators lodged protests with the Assessment Officer, indicating that the propriety of the amounts was a hotly contested issue. In these circumstances, we are reluctant to infer from the operators' failure to request hearings that their objections to the penalty amounts suddenly ceased. There are other equally plausible reasons, cost and inconvenience among them, to explain the defendants' failure to seek formal hearings.

Second, a decision by the Secretary which sets out his findings of fact in these cases and thus demonstrates a considered application of the criteria of section 109, would not "consist of the same information already contained in the proposed assessment order." As indicated above, the proposed assessment orders in this case contained *no* "information" other than *pro forma* recitations that the six criteria for determining penalty amount had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet received, information to which, under our view of the Act, they are entitled.[30]

29. *Id.*, slip op. at 9.

30. The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior administrative jurisprudence. *See, e.g., Ruckelshaus* and *Greater Boston Television*, supra; D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972); Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Station KFH v. FCC, 247 F.2d 570 (D.C. Cir. 1957).

Thus, at least in the context of these enforcement actions,[31] we adhere to the view that each final decision of the Secretary must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty.[32]

The judgment of the district court will be affirmed.

31. *National Independent, supra,* involved a suit to enjoin application of the civil penalty assessment procedures embodied in the Pt. 100 Regulations.

32. We have considered and rejected two other contentions of the Secretary, (1) that the enforcement procedure in the district court cures any defects in the Secretary's final order, and (2) that by failing to object to the lack of findings in any administrative proceeding the defendants have failed to "exhaust administrative remedies," and so are barred from objecting in the courts. In connection with the second contention, we note that once a final order has been entered, there is no opportunity to lodge an objection with the Secretary or Bureau of Mines.

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Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

ORDER AMENDING OPINION

Present: ADAMS, HUNTER and WEIS, *Circuit Judges.*

It is ORDERED that the opinion of this Court filed March 20, 1974, be and hereby is amended as follows:

(1) The first sentence in the first full paragraph on page 9 of the slip opinion is amended to read as follows:

> "In so holding, we observe that the Bureau of Mines had not, at the time these assessments were made, established. . . ."

(2) The last word in line 10 on page 9 is deleted.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: June 12, 1974

FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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RELEVANT DOCKET ENTRIES

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APPLICABLE STATUTES AND REGULATIONS

Federal Coal Mine Health and Safety Act of 1969, section 109(a); 30 U.S.C. section 819(a)

PENALTIES

Sec. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which

were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

TITLE 30–MINERAL RESOURCES

Chapter I–Bureau of Mines, Department of the Interior

SUBCHAPTER O–COAL MINE HEALTH AND SAFETY

PART 100–CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

JANUARY 14, 1971.

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.

Appendix A–Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§100.0 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*–(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could

not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether

the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violations, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 100 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i)(1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess penalty with the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000–$10,000
B. Other Withdrawal Orders	$1,000– $5,000
C. Serious Violations	$100– $1,000
D. Nonserious Violations	$25– $500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$25– $250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc.71–748 Filed 1-15-71; 9:47 am]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action
No. _____

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, P. O. Box 254
Richlands, Virginia;

COOK BRANCH MINING CO., INC.
Virgie, Kentucky 41572

KARST ROBBINS COAL CO.
Louellen, Kentucky 40853;

OXFORD MINING COMPANY
Coalgood, Kentucky 40818;

ROCCO COALS, INC.
Coalgood, Kentucky 40818;

BELMON COALS, INC.
Coalgood, Kentucky 40818;

PUCKETT COAL CO.
Coalgood, Kentucky 40818;

MORETZ MINING COMPANY
Coalgood, Kentucky 40818

NEECE MINING COMPANY
Colson, Kentucky 41809;

BANKS MINING CO., INC.
Colson, Kentucky 41809;

BUCHANAN COAL CORP.
Big Rock, Virginia 24603;

LARK COAL COMPANY
Big Rock, Virginia 24603;

BLACK WATCH MINE #3
Conaway, Virginia 24611;

BLACK DIAMOND FUEL COMPANY
Conaway, Virginia 24614;

THACKER COAL COMPANY
Stacey, Virginia 24616;

B & H COAL CO.
Tazewell, Virginia 24651;
REGIONAL COAL CO.
Crummies Creek, Kentucky 40821

DAY COAL CO., INC.
Isom, Kentucky 41824;

A & E COAL CO.
Colson, Kentucky 41809;

CEDAR GROVE COAL CO., INC.
Hartley, Kentucky 41532;

TALL BOY COAL CO.
Kite, Kentucky 41828;

JEAN COAL CO.
Millstone, Kentucky 41838;

E & K COAL COMPANY
Cody, Kentucky 41808;

PERRY COUNTY COAL COMPANY
Cody, Kentucky 41808

HUB COAL CO.
Cody, Kentucky 41808;

BETTY B COAL CO.
Clintwood, Virginia 24228;

DONNA KAY COAL CO.
Whitesburg, Kentucky 41858;

K & J COAL CO.
Southdown, Kentucky 41815;

POLE COAL CO.
Crown, Kentucky 41811;

PIONEER COAL CO.
Hazard, Kentucky 41701;

FLAX COAL CO.
Littcarr, Kentucky 41834;

ANDERSON COAL CORP.
Fork Ridge, Tennessee;

HARLAN FUEL CO.
Harlan, Kentucky 40831;

DIXIE FUEL CO.
Harlan, Kentucky 40831;

GRAY'S KNOB COAL CO.
Harlan, Kentucky 40831;

KENTUCKY ELKHORN COAL CO.
Virgie, Kentucky 41501;

LOVILLIA COAL CO.
Melrose, Iowa 52569, and

BIG BEN COAL CO.
Melrose, Iowa 52569
Plaintiffs

v.

ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D.C.;

ELBURT G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D.C.;

EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D.C.
and
EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D.C.
Defendants

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This court has jurisdiction over this matter by virtue of 28 USC Section 1331, 28 USC Section 1337, and 28 USC Section 2201. The amount in controversy is in excess of $10,000 exclusive of interest and costs.

2. Plaintiff National Independent Coal Operator's Association is an association comprising a membership of more than 400 producers and processors of bituminous coal in the states of Alabama, Tennessee, Kentucky, West Virginia, Virginia, Iowa and Illinois. It brings this action on its own behalf and on behalf of its members. The individually named plaintiffs herein are or have been owners and operators of underground bitumonous coal mines and coal processing facilities. They are predominantly small and medium size business firms, and are members of the National Independent Coal Operator's Association. They bring this action on their own behalf and as representatives of a class of coal mine operators similarly affected by the unlawful and wrongful actions of defendants as hereinafter described.

3. Plaintiffs' coal mining operations are subject to the Federal Coal Mine Health and Safety Act of 1969, (Title 30 USC, Section 801), hereinafter referred to as the Act, and regulations issued by the Secretary of the Interior in accordance with the provisions of that Act.

4. Defendant Rogers C. B. Morton is Secretary of the Interior of the United States, and as such has responsibility for the administration and enforcement of the Act. His responsibilities in this connection have been delegated by him to defendant Elburt F. Osborn, Director of the Bureau of Mines of the Department of the Interior, and to other subordinate officers and employees of the Department of the Interior, including defendants Edward Failor and Everett Turner who have been delegated the responsibility for determining and assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Act, as hereinafter described.

5. The Act provides in Section 109 (a) (1) thereof (30 USC Section 819) that the operator of a coal mine in which a violation occurs of a mandatory health and safety standard, or who violates any other provisions of the Act, "shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." Section 109(a) (1) further provides that in determining the amount of the penalty to be assessed in respect to any charged violation the Secretary shall consider a number of factors which include the operator's history

of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

6. The Act further provides in Section 109(a) (3) that, "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under Section 105 of this title. Any hearing under this section shall be of record and shall be subject to Section 554 of Title 5 of the United States Code." (Underscoring added.)

7. On January 16, 1971, defendant Morton's predecessor as Secretary of the Interior adopted and caused to be published (Code of Federal Regulations, Title 30, Part 100) a procedure to be followed by the Bureau of Mines in assessing civil penalties under the Act, which procedure purported to be issued under and in accordance with Section 109 of the Act. A copy of said civil penalty procedure is attached here as Exhibit A to this complaint.

8. The aforesaid Part 100 civil penalty assessment procedure was adopted by defendant Morton's predecessor without complying with the Notice and Hearing Procedures of the Administrative Procedure Act, 5 USC Section 553, and contrary to the express requirements of the Act. Notwithstanding that such civil penalty assessment procedure was not adopted and promulgated in accordance with the requirements of Law, defendant Morton has authorized and directed defendants Osborn, Failor and Turner to proceed to apply and carry out such procedure, as explained in further detail below.

9. For the purpose of carrying out the aforesaid Part 100 civil penalty assessment procedure defendants have employed and appointed at the Washington, D.C. headquarters of the Bureau of Mines a staff of assessment officers who have been assigned the duty of issuing proposed orders of assessment as described in Section 100.4 of said Part 100. In applying the aforesaid Part 100 civil penalty assessment procedure defendants and their delegated staff of enforcement officers have issued and caused to be served upon plaintiffs proposed civil penalty assessments which in many instances are based upon inaccurate and erroneous reports of alleged violations of safety and health standards, which make no reasonable or rational distinction between small mines and large mines, and which fail completely to take into account any of the factors which are required to be considered in determining civil penalties under the express language of Section 109 of the Act, as hereinabove described.

10. The assessment officers described in the foregoing paragraph who have been charged with making civil penalty assessments by defendants Morton, Osborn, Failor and Turner perform their function of making assessments without having available to them adequate or sufficient information which would enable them to determine whether a particular cited violation of the health and safety standards of the Act has in fact occurred, or the conditions and circumstances contributing or giving rise to any such violation, and without first giving the operator charged an opportunity to answer or respond to the cited violation. In a great majority of instances the only information these assessment officers have available to them is the fact that a notice of violation was issued by a mine inspector in the course of making an inspection of the mine in question. They do not have information respecting the operator's history of previous violations, whether the operator was negligent, and, if so, to what degree, or the extent to which he made a good faith effort to comply with the standards of the Act or to achieve rapid compliance after notification of a violation, the gravity of the violation, or the effect of the civil penalty assessment on the operator's ability to continue in business; all of which factors are specified in the Act as factors which must be taken into account by the Secretary of the Interior in determining the amount of any civil penalty to be assessed under the Act for any violation of a mandatory safety or health standard.

11. In issuing and causing to be issued the aforesaid civil penalty assessment notices to plaintiffs and other

small and medium size coal operators, defendants and their agents and employees have acted in a highly arbitrary, irresponsible and unreasonable manner in the following respects:

a. They have ignored the express and specific provision of Section 109(a) (3) of the Act that, "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein that the penalty be paid."

b. In determining the amounts proposed to be assessed as civil penalties they have failed and refused to take into account, as required by the express language of Section 109 of the Act, each and every one of the following factors:

(1) the operator's history of previous violations,

(2) the appropriateness of such penalty to the size of the business of the operator charged,

(3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business,

(5) the gravity of the violation, and

(5) the demonstrated good faith of the operator in attempting to achieve compliance after notification of a violation.

c. In many instances civil penalty assessment notices are issued even though the conditions existing in a mine are not in violation of any mandatory health or safety requirement or other provision of the Act, and the

operator has in fact fully complied with applicable health and safety standards under the Act and regulations.

d. In many instances civil penalty assessment notices are issued for insignificant and insubstantial infractions which have nothing whatever to do with health and safety of miners.

e. In many instances civil penalty assessment notices are issued notwithstanding that the charged violation was corrected immediately upon being discovered and before it could have created any hazard to the health and safety of persons in the mine.

f. In many instances civil penalty assessment notices are issued notwithstanding that the mine operator has made a diligent effort to obtain material and equipment necessary to meet the mandatory health and safety standards of the Act, but, in spite of such diligent efforts, has been unable to do so.

g. In many instances the amounts assessed as proposed civil penalties are grossly disproportionate to the nature of the violation charged.

h. In many instances the amounts assessed as proposed civil penalties against small mine operators are equal to or in excess of amounts assessed against large mine operators for the same or comparable violations of the mandatory health and safety standards of the Act.

i. No consistent or rational pattern of assessments is followed in respect to violations of particular safety or health standards in mines of comparable size and economic circumstances, with the result that one mine may be assessed a substantially higher penalty than another without any explanation of justification for the disparity.

j. The dominant factor in determining the amount of a penalty assessment appears to be the whim or emotional disposition of the particular assessment officer making the assessment at the particular time the assessment is made, since no objective criteria or standards have been established or promulgated.

k. In a great many instances the amounts assessed as proposed civil penalties are so excessive that plaintiffs and other small and medium size operators can not possibly pay them and remain in business, and, in fact, a number of plaintiffs herein have been compelled to discontinue their mining operations because of such excessive penalty assessments and the threat that further excessive penalties will be assessed against them.

12. In exercising the authority given to them pursuant to Section 104(a) of the Act to order the withdrawal of personnel from underground coal mines where conditions of imminent danger are found to exist defendants and their employees and agents have grossly abused their discretion by arbitrarily, unreasonably and irresponsibly issuing such withdrawal orders in many situations in which (a) conditions in a mine do not in fact present a threat of imminent danger, (b) the operator is in the process of correcting a condition which might reasonably be expected to present a threat of imminent danger, and (c) the operator has on his own initiative already withdrawn all personnel from the mine, and the mine is closed. Further, defendants and their agents and employees have failed to apply any consistent or objective standards as to what constitutes imminent danger, with the result that a condition which may be found reasonably safe in one mine is classified

as imminent danger in another. As a result of such inconsistency and lack of objective standards plaintiffs and other coal operators are confused and confounded, and the entire coal industry is permeated with an atmosphere of uncertainty and anxiety respecting the policies and practices of defendants and their employees and agents pursuant to their authority to issue Section 104(a) withdrawal orders.

13. Defendants have further abused their discretion, and acted contrary to the intent and purpose of the Act, by directing that the civil penalty to be assessed in any situation in which a Section 104(a) withdrawal order is issued shall be in an amount not less than $5,000, and ranging up to $10,000. In numerous instances defendants and their delegated staff of assessment officers have issued proposed civil penalty assessment notices to plaintiffs and other coal operators in amounts of $5,000 or more based upon withdrawal orders which were wrongfully or erroneously issued, or where the withdrawal order was based upon an actual condition of imminent danger but such condition was due to natural causes beyond the control of the mine operator and not due to his fault or negligence, and the imminent danger condition was not due in any manner to a failure of the operator to comply with the mandatory safety and health standards of the Act and regulations.

14. Under the aforesaid Part 100 civil penalty assessment procedure a mine operator who receives a proposed order of assessment is required to file a written protest to such proposed order within 15

working days from the date of its receipt, and upon his failure to do so he is deemed to have waived his rights to formal adjudication and opportunity for hearing as provided in Section 109(a)(3) of the Act. Although Part 100 thus purports to provide an opportunity for the operator charged to seek formal adjudication, this procedure, for the reasons described hereinafter, effectively denies the operator his statutory right to a hearing, and is designed to discourage him from pursuing the specified adjudicatory procedures. Within the context of the aforesaid Part 100 procedure a formal adjudication hearing becomes merely a *post facto* step which occurs after the initial notice of penalty assessment is served upon the operator, as contrasted with the type of prior hearing contemplated by and expressly called for in the Act, and imposes upon the respondent operator the burden of disproving the existence of a violation which the Secretary of the Interior and his agents and employees have already determined to have occurred, and for which they have already assessed a proposed penalty. Further, in many instances where an operator has requested formal adjudication by the Office of Hearings and Appeals of the Department of Interior pursuant to the Pact 100 civil penalty assessment procedure substantially higher penalties are ultimately imposed. As a result plaintiffs and other small and medium size coal operators have been put on notice that by requesting an adjudicatory hearing under the Part 100 procedure they run a very high risk of receiving penalties even greater than those administratively proposed by the assessment officers. Because of their fear of receiving such higher penalties plaintiffs and other small and medium size coal

operators have been induced and constrained to forego requesting such formal adjudicatory hearings, and, in effect, are given no practical choice other than to let the administratively proposed orders of assessment become final orders. Upon becoming final, such orders are entered on the official records of the Bureau of Mines as conclusive evidence of the operator having violated the mandatory standards of the Act, are required to be taken into account and considered in connection with any further proceedings for the assessment of civil penalties for violations subsequently charged against the mine operator, and are subject to collection proceeding brought against the operator by the United States Government.

15. For the foregoing reasons the Part 100 civil penalty assessment procedure adopted and applied by defendants is unreasonable and oppressive, and is not in compliance with the intent and the express language of the Act. The unlawful and arbitrary manner in which defendants and their delegated staff of enforcement officers are and have been applying the aforesaid Part 100 civil penalty assessment procedure has directly resulted in forcing many small and medium size coal operators, including a number of plaintiffs herein, to discontinue or abandon their mining operations; has threatened the continued existence of the small and medium size coal mine operations remaining in business; has caused and is causing loss of employment for thousands of coal miners; and has caused and is causing economic havoc throughout the coal industry and the communities and regions which are dependent upon the coal industry for their economic livelihood. In the two

years that have elapsed since the effective date of the Act, and the regulations adopted thereunder, almost 2000 small and medium sized underground bituminous coal mines have been forced to permanently abandon their operations, and the accelerated rate at which the remaining small and medium size mines are currently being abandoned is such that this important segment of the bituminous coal industry is threatened with total extinction within the next two years. If defendants are permitted to continue to follow and apply the aforesaid Part 100 civil penalty assessment procedure plaintiffs and other small and medium size operators of underground bituminous coal mines will suffer irreparable injury and harm for which they will have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray this Honorable Court to:

1. Declare that the part 100 civil penalty assessment procedure, in its concept and its operation and effect, denies plaintiffs substantive rights guaranteed by the Constitution, and by the Act itself, is contrary to statutory law, and unlawfully threatens plaintiffs and other coal operators with deprivation of their property without due process of law;

2. Issue an injunction restraining defendants from continuing to administer or apply the provisions of the aforesaid Part 100 civil penalty assessment procedure; and

3. Provide such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ John L. Kilcullen
John L. Kilcullen
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
659-1600

/s/ Peter F. Healey
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel:

Gall, Lane, Powell & Kilcullen
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, et al.,

Plaintiffs

v.

ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D.C. 20240;

) Civil Action No. 397-72

ELBURG G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240;

EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240; and

EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240;

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

This Court lacks jurisdiction over the subject matter of this action because Plaintiffs have failed to exhaust their administrative remedies.

Third Defense

There is a lack of equity jurisdiction in this Court since Plaintiffs have an adequate remedy at law.

Fourth Defense

For their Answer to the numbered paragraphs of the Complaint, Defendants show the Court as follows:

1. Paragraph 1 is a conclusion of law which does not necessitate an answer; to the extent which it may be deemed an allegation of fact, it is denied.

2. Defendants lack information sufficient to form a belief as to the truth of the allegations in paragraph 2, and, accordingly, deny the same.

3. The allegations in paragraph 3 are admitted.

4. The allegations in paragraph 4 are admitted.

5. In reciting in paragraph 5 of the Complaint, the provisions of the first sentence of Section 109(a) (1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §819(a) (1). Plaintiffs have left out an exception. Said sentence, with the exception included, reads in its entirety as follows: "The operator of a coal mine in which a violation occurs of a mandatory health

or safety standard or who violates any other provision of this Act, except the provisions of title 4 (underscoring added), shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation." Except for the foregoing, Defendants admit the allegations in paragraph 5 of the Complaint.

6. The allegations in paragraph 6 are admitted.

7. The allegations in paragraph 7 are admitted.

8. The allegations in paragraph 8 are denied.

9. The allegations in paragraph 9 are denied.

10. The allegations in paragraph 10 are denied.

11. The allegations in paragraph 11 and each of its subparagraphs are denied.

12. The allegations in paragraph 12 are denied.

13. The allegations in paragraph 13 are denied.

14. The allegations in paragraph 14 are denied.

15. The allegations in paragraph 15 are denied.

16. Except as herein admitted, Defendants deny each and every allegation contained in the Complaint.

WHEREFORE, Defendants demand that the Com-

plaint be dismissed and for such other relief as may be just and proper.

/s/
Harold H. Titus, Jr.
United States Attorney
for the District of Columbia

/s/
Joseph M. Hannon
Assistant United States Attorney

/s/
Robert M. Werdig
Assistant United States Attorney
Attorneys for Defendants

OF COUNSEL:

/s/J. Philip Smith
J. Philip Smith
Assistant Solicitor
Mine Health and Safety
U.S. Department of Interior
Washington, D.C. 20240
Telephone: (202) 343-6221

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	
	)	Civil Action No.
	)	397-72
ROGERS C. B. MORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

MOTION OF DEFENDANTS TO DISMISS THE ACTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by their counsel, the United States Attorney for the District of Columbia, move the Court to dismiss the action on the grounds that the complaint together with defendants' Exhibits 1 through 4 indicate there is no genuine issue of any material fact and defendants are entitled to judgment as a matter of law.

HAROLD H. TITUS, JR.
United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

ROBERT M. WERDIG, JR.
Assistant United States Attorney

F COUNSEL:

Philip Smith
ssistant Solicitor
ine Health and Safety
.S. Department of Interior

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al.,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D C. 20240;	)	NO. 397-72
ELBURT G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D C. 20240;	)	
EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D. C. 20240; and	)	
EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D. C. 20240	)	
Defendants	)	INTERROGATORIES

TO: Robert M. WERDIG, Assistant United States Attorney, United States Court House, Constitution

Avenue and John Marshall Place, Washington, D. C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D. C. 20240, Attorneys for Defendants:

Plaintiffs request that defendant EVERETT TURNER, ASSESSMENT OFFICER, BUREAU OF MINES, UNITED STATES DEPARTMENT OF THE INTERIOR, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

(1) State the number of notices of Violations and Orders of Withdrawal that have been received by the Office of Assessments and Compliance Assistance from District and sub-District offices of the U. S. Bureau of Mines for alleged violations of the mandatory health and safety standards established by the Federal Coal Mine Health and Safety Act of 1969 (Title 30 USC Section 801), and regulations issued thereunder, since the effective date of the Act on March 30, 1970.

(2) Of the figure listed in response to Interrogatory Number 1, state the total number of Notices of Violations and Orders of Withdrawal with respect to which Proposed Orders of Assessment of civil penalties have been issued by you in your capacity as Assessment Officer or by those acting on your behalf since the effective date of the regulations entitled *Part 100 - Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969* (Fed. Reg., Vol. 36, No. 11) on January 16, 1971.

(3) State the total amount in dollars of the Proposed Orders of Assessment of civil penalties issued by you pursuant to the Part 100 Civil Penalty Assessment

Regulations as referred to in Interrogatory Number 2.

(4) a) State the total number of Section 104(a) imminent danger Withdrawal Orders received by your office since April 1, 1971, and attach a copy of each such Order.

b) State the total number of such Section 104(a) imminent danger Withdrawal Orders with respect to which you have issued Proposed Orders of Assessment of civil penalties pursuant to the Part 100 Regulations, and attach a copy of each such Proposed Order of Assessment.

c) If any such Proposed Orders of Assessment have been amended attach a copy of each such amended Proposed Order of Assessment.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs

1250 Connecticut Avenue, N.W.
Suite 707
Washington, D.C. 20036
Telephone: 202/659-1600

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dated: August 2, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al.,	)	
PLAINTIFFS	)	CIVIL ACTION
	)	NO. 397-72
v.	)	
ROGERS C. B. MORTON, et al.,	)	
DEFENDANTS	)	

ANSWERS TO INTERROGATORIES

Everett Turner, Assessment Officer, Bureau of Mines, United States Department of the Interior, being first duly sworn, according to law, answers the interrogatories of plaintiffs as follows:

(1) A total of 115,000 Notices of Violations and Orders of Withdrawal have been received by the Office of Assessments and Compliance Assistance from District and Subdistrict offices of the United States Bureau of Mines, since March 30, 1970, to and including June 30, 1972.

(2) A total of 92,334 Notices of Violation and 5,131 Orders of Withdrawal were processed with respect to which Proposed Orders of Assessment of civil penalties were issued by the Assessment Office, since January 16, 1971, through June 30, 1972.

(3) The total amount in dollars of the Proposed Orders of Assessment for civil penalties issued by the Assessment Office pursuant to the Regulations through June 30, 1972, was:

Original Proposed Assessments $20,187,695.00
Adjusted Proposed Assessments $16,344,646.00

(4) (a) and (b) Orders of Withdrawal and Notices of Violation citing violations of the Act or Regulations, under Sections 104(a), 104(b), 104(c)(1) and 104(c)(2) of the Act, have been issued since September of 1971 by utilizing one form. When these forms are received in the Assessment Office the file clerk, who is not required to study the form to determine what type of an Order of Withdrawal such as 104(1), 104(b), 104(c)(1), or 104(c)(2) has been issued, inserts them into the inspection file. They are not separated. With approximately 5,000 inspection files averaging six divisions per file or 30,000 divisions, a response to these interrogatories is not feasible and would be unnecessarily burdensome upon defendants.

(4) (b) and (c) As a result of a letter of August 8, 1972, from plaintiffs' counsel, my office has permitted plaintiffs' counsel to have access to and to copy all documents referred to in Interrogatories numbered 4(b) and (c).

/s/ Everett Turner
Everett Turner
Assessment Officer

Subscribed and sworn to before me this 29th day of August, 1972.

/s/ Margaret B. Burton
Notary Public

[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al. Plaintiffs,	FILED SEP 1 1972 JAMES F. DAVEY, Clerk
v.	CIVIL ACTION
ROGERS C. B. MORTON, Secretary of the Interior, et al. Defendants.	NO. 397-72

REQUEST FOR ADMISSIONS OF FACTS

TO: ROBERT M. WERDIG, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D.C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D.C. 20240, Attorneys for Defendants;

Plaintiffs, pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, request defendant Everett Turner, Assessment Officer, Bureau of Mines, United States Department of the Interior, to admit for the purpose of this action only the truth of the following facts:

1. No guidelines or standards defining the six criteria set forth in Sections 100.2 and 100.4 of the Part 100 Civil Penalties Regulations (30 CFR Part 100) have been used or are used by me in determining and making proposed assessment orders and amended assessment

orders for alleged violations of the Federal Coal Mine Health and Safety Act of 1969 (30 USC Section 801 *et seq.*)

2. No guidelines or standards respecting the weight and consideration to be given to each of the six criteria set forth in the Part 100 Regulations have been or are used by me in determining and making proposed assessment orders and amended assessment orders for alleged violations of the Act.

3. Mine operators who are issued proposed assessment orders and amended assessment orders are not furnished with explanatory material regarding the manner in which each of the six criteria set forth in the Part 100 Regulations are applied by me in determining and making such assessment orders or with regard to the weight and consideration given to each of the six criteria.

4. No documentation descriptive of the manner in which each of the six criteria set forth in the Part 100 Regulations is considered, weighed, or applied by me in determining and making proposed assessment orders and amended assessment orders is incorporated or included in the files or worksheets of the Office of Assessments and Compliance Assistance.

5. No financial data or information pertinent to the effect of proposed assessments on the ability of operators to continue in business is considered or reviewed by me prior to the issuance of initial proposed assessment orders.

6. No written findings of fact that violations cited in proposed assessment orders or amended assessment orders are made by me concurrently with the determination and issuance of such assessment orders

and no such findings of fact are served on mine operators who are issued such proposed and amended assessment orders.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202-659-1600

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: September 1, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al., Plaintiffs,	)	
v.	)	Civil Action No. 397-72
ROGERS C. B. MORTON, et al., Defendants.	)	

ANSWERS TO REQUESTS FOR ADMISSIONS

Defendants by their counsel, the United States Attorney for the District of Columbia, submit the following answers in response to plaintiff's Request for Admissions.

1. To plaintiffs' Request for Admission No. 1:

> "1) It is admitted that no *written* guidelines or standards other than those contained in the Act and in 30 CFR Part 100 are used in determining or making proposed assessment orders. However, oral guidelines are provided staff assessors respecting how to evaluate the six statutory criteria and how to utilize all available information concerning the particular operator or miner involved and the violation alleged.

2. To plaintiffs' Request for Admissions No. 2:

See No. 1.

3. To plaintiffs' Request for Admission No. 3:

"3) Mine operators are not ordinarily furnished with written explanatory material regarding the manner in which each of the six statutory criteria are applied in determining and making proposed assessment orders.

Further to the best of Mr. Everett Turner's recollection, no mine operator has ever asked for a written explanation. However, on numerous occasions, Mr. Turner met with mine operators and/or their representatives, in person, to orally explain to them, the manner in which each of the six statutory criteria was applied by him in a given case.

4. To plaintiffs' Request for Admission No. 4:

Denied.

5. To plaintiffs' Request for Admission No. 5:

Denied.

6. To plaintiffs' Request for Admission No. 6:

Denied.

HAROLD N. TITUS, JR.
United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

ROBERT M. WERDIG, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Answers to Requests for Admissions, has been made upon plaintiffs by mailing a copy thereof to attorney for plaintiff, John L. Kilcullen, Esq. 1250 Connecticut Avenue, N. W. Washington, D.C. 20036 on this 2nd day of October 1972.

ROBERT M. WERDIG, JR.
Assistant United States Attorney

OF COUNSEL:

J. Philip Smith
Assistant Solicitor
Mine Health and Safety
U.S. Department of Interior

Final Order/No. request for Adj.

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

CERTIFIED MAIL
Return Receipt Requested

FILED
NOV - 6 1972
JAMES F. DAVEY, Clerk

Re: Mine:

Case No.

Proposed Order ( )
Amended Order ( )
Reissued Order ( )

Gentlemen:

No request for formal adjudication having been filed within twenty (20) days of your receipt of the above-captioned Order dated _____, you are hereby notified that the said Order has now been entered as the Final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of _____ is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

Everett Turner

Everett Turner
Assessment Officer

cc: Case File
Reading File

APPENDIX DOCUMENT "E"

United States Department of the Inferior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: _____
Operator

Case No. _____

FILED
NOV - 6 1972
JAMES F. D.

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____ PROPOSED ORDER OF ASSESSMENT DATED _____ DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Everett Turner
ASSESSMENT OFFICER

APPENDIX DOCUMENT "H"

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

IN THE MATTER OF:

Re: Mine:

Case No:

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration, it is hereby found that the below listed violations have, in fact, occurred, and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of the violation; it is hereby ordered that _____ be and the same is hereby assessed a civil penalty in the amount of _____ ($) for the following violations:

Violation No.	Date Issued	Violation	Assessment

FILED
NOV - 6 1972
JAMES F. DAVEY, Clerk

Total Assessed Amount _____

Dated at Washington, D. C.
and entered as the Proposed
Order of Assessment

_____
Assessment Officer

cc: OMCA Case File
ADP Denver
Reading File

APPENDIX DOCUMENT "N"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

IN THE MATTER OF:

Re: Mine:

Case No:

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and verification having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that _____ be and the same is hereby assessed a civil penalty in the amount of _____ ($) for the following violation:

Violation No:	Date Issued:	Violation:	Assessment:

BEST COPY AVAILABLE

Total Assessed Amount _____

FILED
NOV - 6 1972
JAMES F. Davey

_____
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment

cc: OMCA Case File
ADP Denver
BOM Files

APPENDIX DOCUMENT "O"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMIBA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al. Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 397-72
ROGERS C. B. MORTON, Secretary of the Interior, et al. Defendants.	)	INTERROGATORIES

TO: ROBERT M. WERDIG, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D. C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D. C. 20240, Attorneys for Defendants:

Plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, request that defendant Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior, answer under oath the following interrogatories:

1. (a) State the total number of applications pursuant to Section 105 of the Federal Coal Mine Health and Safety Act of 1969 (30 USC Section 801 *et seq.*) that have been filed with the Office of Hearings and Appeals for review of withdrawal orders issued under Section 104 of the Act, such figure to include applications for review of terminated or modified closure orders.

(b) State the total number of such Section 105 cases in which final decisions have been made.

(c) State the average length of time which has elapsed from the date of the filing of such applications for review of withdrawal orders and final decisions thereon.

(d) State the total number of such Section 105 review cases which are pending at this time (i.e., as to which no final decision has been made).

2. (a) State the total number of civil penalty assessment cases under Section 109 of the Act that have been referred to the Solicitor's office of the Department of the Interior as the result of petitions for hearing and formal adjudication filed with the Office of Assessments and Compliance Assistance by mine operators pursuant to Section 100.4(i) of the Part 100 Civil Penalties Assessment Regulations (30 CFR Part 100).

(b) State the total number of Section 109 cases that the Solicitor's office has filed with the Office of Hearings and Appeals pursuant to petitions for hearing and formal adjudication filed by mine operators.

(c) State the total number of Section 109 cases as to which mine operators have filed petitions for hearing and formal adjudication directly with the Office of Hearings and Appeals pursuant to Section 100.4 of the Part 100 Civil Penalties Assessment Regulations, as amended June 15, 1972.

(d) State separately the total number of Section 109 cases in which hearing officers have conducted hearings and rendered decisions and the average length of time such hearings have involved.

(e) State separately the average length of time which has elapsed from the date of the operator's

petition for hearing until the date of the hearing officer's decision.

(f) State the total number of Section 109 cases which are currently pending adjudication (1) by hearing officers, and (2) by the Board of Mine Operations Appeals.

3. (a) State the number of decisions of hearing officers in Section 109 proceedings which have been reviewed by the Board of Mine Operations Appeals.

(b) State the number of such cases in which the Board has rendered final decisions, and the average length of time which has elapsed from the date of the hearing officer's decision and the final decision of the Board in such cases.

(c) State the total number of Section 109 cases decided by the Board and hearing officers which have been referred to the Justice Department for institution of enforcement proceedings in appropriate federal district courts.

(d) State separately the number of proceedings which have been filed in appropriate federal district courts by the Justice Department to enforce decisions of the Board and hearing officers in Section 109 cases, and total amount of civil penalties as to which enforcement has been sought in such cases.

4. (a) State both the total number of penalty assessment cases wherein the proposed or amended assessment made by the Office of Assessments and Compliance Assistance has become the final Assessment Order of the Secretary, and the total monetary amounts of all such final assessment orders.

(b) State both the total number and the total amount of such final Assessment Orders of the

Secretary which have been referred to the Justice Department for the institution of enforcement proceedings.

(c) State both the total number and the total monetary amount of such final Assessment Orders of the Secretary as to which the Justice Department has filed petitions for enforcement in appropriate federal district courts.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs

1250 Connecticut Avenue, N. W.
Suite 707
Washington, D. C. 20037
(202/659-1600)

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dated: September 14, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCATION, et al., Plaintiffs,	)	Civil Action No. 397-72
v.	)	
ROGERS C. B. MORTON, Secretary of the Interior, et al., Defendants.	)	

ANSWERS TO INTERROGATORIES

Everett Turner, being first duly sworn according to law, deposes and says, upon his personal knowledge and belief, he gives the following answers to interrogatories of plaintiffs', dated September 14, 1972:

1(a) 2,942[1]

1(b) 2,365

1(c) My office does not keep statistics based upon the length of time a case is in my office pending decision. Obviously the time varies greatly from case to case.

1(d) 577

2(a) The total number of penalty cases referred for hearing and formal adjudication as of August 31, 1972, is 2,354.

[1] My office does not separate Applications for Review Orders of Withdrawal from Applications for Review Notices of Violation, rather the §105 Applications for Review are intermingled.

2(b) 1,581[2]

2(c) 964

2(d) 619 decisions. However, only 132 are decisions on the merits after hearing; the remainder are dismissals and settlements.

2(e) See the answer to 1(c) above. However, to date none of the operators' petitions for hearing filed since June 15, 1972, have gone to hearing.

2(f) Hearing Examiners - 1,935

3(a) 21

3(b) 17. See the answer to 1(c) in regard to average length of time of decisions.

3(c) 22 (7 in process)

3(d) The information sought by interrogatory 3(d) is unavailable in this office. Plaintiffs are referred to John L. Murphy, Chief, Administrative Regulations Section, Criminal Division, U. S. Department of Justice.

4(a) (1) The total number of penalty cases that have become the final Assessment Order of the Secretary as of August 31, 1972, is 2,480.

(2) The total amount for cases becoming the final Assessment Order of the Secretary is $2,901,434.00.

4(b) (1) The total number of penalty cases that have been referred to the Justice Department for institution of enforcement proceedings as of August 31, 1972, is 958.

(2) The total amount for cases that have been referred to the Justice Department as of August 31,

[2] Figure includes 62 civil penalty cases received in November through December 1970 which were not processed through the Assessment Office, Bureau of Mines.

1972, is $942,100.00.

4(c) See 3(d) above.

Everett Turner
Assessment Officer

Subscribed and sworn to before me this ____ day of _____, 1972.

Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 327-72
ROGERS C. B. MORTON, Secretary of the Interior, et al., Defendants.	)	

PLAINTIFFS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND PLAINTIFFS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs herewith oppose defendants' "Motion to Dismiss or in the Alternative, For Summary Judgment," and Move the Court for summary judgment in their favor on grounds that the Complaint herein properly states a cause of action for the relief requested, there exist no genuine issues of material fact, and plaintiffs are entitled to judgment as a matter of law.

John L. Kilcullen

John L. Kilcullen

Attorney for Plaintiffs
National Independent Coal
Operator's Association, et al.

Of Counsel:

Gall, Lane, Powell and Kilcullen
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Telephone: (202) 659-1600

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Supreme Court, U. S.
FILED
NOV 5 1974
MICHAEL RODAK, JR., CLERK

No. 73-2066

In the Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the procedures by which the Secretary of the Interior assessed civil penalties under the Federal Coal Mine Health and Safety Act of 1969 ("the Act") before March 15, 1973, were invalid.

The Act establishes mandatory health and safety standards to protect the Nation's coal miners. 30 U.S.C. 801, 841, 861. The Secretary is directed to enforce these standards by assessing civil penalties for violations of them by coal mine operators and miners. 30 U.S.C. 819. Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), provides;

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. * * *

In determining the amount of the penalty, Section 109(a)(1) of the Act requires the Secretary to consider six factors, including the gravity of the violation, whether the coal mine operator was negligent, his efforts to achieve compliance and any history of previous violations, as well as the size of his business and the effect of the penalty on his ability to continue in operation. 30 U.S.C. 819(a)(1).

Payment of the penalty may be enforced by the Secretary only by a petition for enforcement in the appropriate district court; in that proceeding, the coal mine operator is entitled, with exceptions not here material, to a trial *de novo* concerning all relevant issues, 30 U.S.C. 819(a)(4).

Under the procedures in effect when this suit was instituted, each of the approximately 80,000 violations of the Act reported each year was reviewed and evaluated by an agency assessment officer, who then sent the coal mine operator involved a proposed order of assessment. That document specified the notice of violation (previously furnished the operator) upon which it was based, recited that the statutory factors had been

considered, and stated the amount of the proposed penalty, 30 C.F.R. 100.3(b) and (c) (1973).[1] The operator could protest the proposal and obtained reconsideration by the assessment officer; in addition, he was entitled to a formal hearing, resulting in a decision incorporating findings of fact, 30 C.F.R. 100.3(d)-(h), 100.4 and 100.5 (1973).[2] If the coal operator did not request a hearing, the proposed or reissued order of assessment became the Secretary's final assessment order, 30 C.F.R. 100.3 (e) and (h) (1973), and, if unpaid, formed the basis for the Secretary's petition for enforcement in an appropriate district court.

Petitioners sought a declaratory judgment that these procedures were inconsistent with the Act, because they did not require findings of fact for all penalty assessment orders; they also sought an injunction against the further utilization of the procedures. The district court issued such an injunction, and the procedures were suspended on April 24, 1973.[3]

The court of appeals reversed, concluding that the Act, in light of its legislative history, does not require a formal decision with findings of fact unless the operator requests a hearing. But instead of reinstituting

---

[1]The Part 100 procedures were modified in June 1972 (37 Fed. Reg. 11861-11862); it was the modified version, rather than that reproduced in petitioner's Appendix D, which was enjoined by the district court. The differences in the two versions are not material to the disposition of this case. We are lodging a copy of the modified version with the Clerk.

[2]The burden of proving both the occurrence of the violation and the appropriateness of the penalty was on the agency in those proceedings, 43 C.F.R. 4.587.

[3]They were replaced by interim formal hearing procedures in all cases, 38 Fed. Reg. 10085, pending appeal of the district court's judgment.

the original Part 100 procedures, the Secretary issued a new Part 100, effective August 1, 1974. 39 Fed. Reg. 27558-27561.[4]

The new Part 100 establishes an assessment formula for determining proposed penalties. Moreover, under the new prodecures, all proposed assessments will be accompanied not only, as before, by a reference to the notice of violation and a statement of the amount of the proposed penalty, but also by formula determinations ("penalty points") resulting from the application of the six statutory criteria to each violation. Thus, the operator is now in effect provided with findings of fact even when he does not request a hearing.

Accordingly, there is no occasion for this Court to review the conclusion of the court below concerning procedures that are no longer in effect.[5]

As petitioners note, the conclusion of the court below that the old assessment procedures complied with the Act is in conflict with the decision of the Third Circuit in *Morton v. Delta Mining, Inc.*, 495 F. 2d 38. We have filed a petition for a writ of certiorari in that case, since it directly affects the Secretary's ability to enforce thousands of assessment orders issued under the old procedures.[6] Therefore, *Delta Mining*, unlike the instant case, involves a question of continuing

[4]These regulations are contained in Appendix F in our petition for a writ of certiorari in *Morton* v. *Delta Mining, Inc.*, filed November 1, 1974.

[5]In any event, we submit that the court below was correct, for the reasons stated in our petition for a writ of certiorari in *Morton* v. *Delta Mining, Inc.*, a copy of which we are furnishing petitioners.

[6]Petitions for enforcement of assessment orders must be brought in the appropriate district court, 30 U.S.C. 819(a)(4). Since there are no coal mines in the District of Columbia, that circuit's views on the validity of the old Part 100 procedures cannot control the outcome of any action to enforce penalties assessed under those procedures.

importance to the enforcement of the Act. While we agree with petitioners that the uncertainty concerning the validity of the original procedures caused by the disagreement among the circuits should be resolved, we submit that the proper case in which to resolve that uncertainty is *Delta Mining*, not the instant case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11

Supreme Court, U. S.
FILED
NOV 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

JOHN L. KILCULLEN
Webster and Kilcullen
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone (202) 785-9500

Attorney for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

PRELIMINARY COMMENT

Petitioners request the Court to take note of the fact that the Respondents' Memorandum in Opposition to granting certiorari was filed 55 days beyond the time

allowed under Rule 24, and no request for a time extension was presented to the Court.

REPLY TO ARGUMENT

Respondents' argument in opposition to certiorari here is inconsistent and illogical. Their Memorandum admits the conflict, on an identical question of law, between the decision of the court below and the decision of the Third Circuit in *Morton v. Delta Mining Company* 495 F.2d 38, but argues that there is no occasion for this court to review the decision of the court below because it involves civil penalty assessment procedures which are no longer in effect.

In the very next sentence respondents' Memorandum notes that the same assessment procedures were involved in *Delta Mining*, and that respondents are themselves seeking certiorari in that case because "it directly affects the Secretary's ability to enforce thousands of assessment orders issued under the old procedures."[1] Respondents thus contradict their own contention that the old assessment procedures no longer have force or effect, since they still intend to seek enforcement of thousands of penalty assessments issued under such procedures.

The question petitioners here are seeking to have resolved is whether, contrary to the express holding of the district court below, the Secretary can assess

[1] Respondents' Memorandum, p. 4. The Secretary's Petition for Certiorari in *Delta Mining* was filed on November 1, 1974; No. 74-521.

penalties without making factual findings respecting the occurrence of a violation and the application of the six statutory criteria for determining the amount of the penalty.

In this case the District Court for the District of Columbia held that the language of Section 109(a) of the Federal Coal Mine Health and Safety Act "absolutely requires" that in all cases before an assessment order can become final the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations with regard to the amount of the penalty which is warranted, and (3) make findings that a violation did occur. The Court concluded that "To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a 'decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted.' "[2]

This ruling was followed in three other district court cases in which the Secretary sought enforcement of penalties assessed under the Part 100 procedures.[3] Thus, to date four district court decisions, and a circuit court decision, *Delta Mining, supra,* have held that the statute requires factual findings to support the penalty assessments of the Secretary. The lone decision to the contrary is that of the court below.

[2] 357 F.Supp. 509, 512. See Appendix B, p. 10.

[3] *Morton v. GMW Coal Co.; Morton v. Delta Mining Co.; Morton v. Mears et al.* The district court decisions in these cases were consolidated and affirmed by the Third Circuit in *Morton v. Delta Mining Co., supra.*

It goes without saying that it is in the interest of judicial economy, and avoidance of a multiplicity of suits, to have this question finally decided by this Court rather than have it litigated in separate cases in various district and circuit courts throughout the country.

The issue of whether the statute requires the Secretary to make factual findings in all penalty assessment cases is presented in its broadest scope in this case. The decision of the district court below was based on an extensive record which included testimony of Interior Department officials and tabulations of penalties assessed in hundreds of assessment cases processed under the Secretary's summary procedures.

It would appear that by seeking certiorari in *Delta Mining Co.* and opposing certiorari herein, the Secretary seeks to avoid direct confrontation on the whole issue since the decision in *Delta* was limited to the facts of the enforcement actions there consolidated, and a decision by this Court therein would not in any way put the problem to rest with respect to cases which are factually distinguishable. In *Delta,* one factual distinction was that each mine operator had lodged a protest against the penalty assessment, whereas in the present case the district court held that it is the Secretary's responsibility to see that the statutory requirements are complied with in all cases even though the mine operator does nothing.

In their Memorandum (p. 4, fn. 6) respondents make the frivolous contention that the decision of the court below cannot affect penalty enforcement cases in other jurisdictions "since there are no coal mines in the District of Columbia." The fact that there are no coal mines in the District of Columbia has nothing to do

with the question of whether the Secretary is utilizing illegal assessment procedures. Moreover, since the Secretary maintains his headquarters in the District of Columbia, and regulations issued by him there affect coal mines throughout the entire Nation, a ruling by the Court of Appeals for the District of Columbia Circuit on the question of legality of his procedural regulations is at least of equal weight with a decision of any other circuit. Interestingly, the Secretary himself cited the decision below as authority in the *Delta Mining* case.

The Secretary acknowledges that there is a disagreement among the Circuits regarding the validity of his assessment procedures, and that this uncertainty should be resolved. Petitioners submit that this case is the proper case in which to resolve that uncertainty.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1974

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 494 F.2d 987, is printed in Appendix A to the petition for certiorari previously filed herein. Appellants were originally granted judgment by the United States

District Court for the District of Columbia. The opinion of the District Court, which is reported at 357 F.Supp. 509, is printed in Appendix B to the petition for certiorari.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 11, 1974. A petition for writ of certiorari was filed in this Court on July 23, 1974. This Court granted the petition on January 27, 1975. This Court has jurisdiction to review the judgment herein by a writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures adopted by the Secretary of the Interior for assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969 are in conflict with the procedures specified in section 109(a) of that Act?

2. Whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary of the Interior may assess civil penalties against mine operators without making and publishing factual findings?

STATUTE AND REGULATIONS INVOLVED

This case involves interpretation of section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a), the pertinent portions of which are printed in the Appendix at p. 2.

The procedural regulations of the Secretary of the Interior dealing with assessment of civil penalties, codified as Title 30 Code of Federal Regulations, Part 100, are reproduced in the Appendix at p. 4.

STATEMENT OF THE CASE

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act) established safety and health standards for underground coal mines, and vested in the Secretary of the Interior the authority to enforce such standards.

The Act provides in section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary of the Interior in an amount not in excess of $10,000 for each such violation, and that in determining the amount of the penalty the Secretary shall consider six factors, namely, the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

The procedure for assessing civil penalties is spelled out in section 109(a)(3). It provides:

> "A civil penalty shall be assessed by the Secretary *only after* the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code." (Emphasis added).

At the time the Act became effective in March 1970 the Secretary delegated his penalty assessment functions to the Interior Department Board of Mine Operations Appeals, and published procedural rules which provided for initial adjudication of penalty cases by a hearing examiner, with a right of appeal to the Board.[1] These rules provided that "Where the Examiner (or the Board) has found that a violation of a mandatory health or safety standard or any other provision of the Act has occurred, he shall determine the amount of the penalty which is warranted and incorporate in the decision concerning the violation an order requiring that the penalty be paid."[2] The rules further specified that such

[1] Title 30 C.F.R. Part 301, published March 25, 1970; Federal Register, Vol. 35, pp. 5255-5258. These regulations were subsequently recodified as 43 C.F.R. Part 4, section 4.540 et seq.

[2] 30 C.F.R. section 301.53(e); revised and recodified as 43 C.F.R. section 4.545.

decisions "shall include a statement of findings and conclusions and the reasons or basis therefor, on the material issues of fact, law or discretion presented on the record."[3]

If these procedural rules had been adhered to there would have been no occasion for the initiation of the present action.

Some nine months later, however, the Secretary adopted an entirely different procedure for assessment of civil penalties, designated as 30 C.F.R. Part 100,[4] by which he delegated his penalty assessment functions to "an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines."

Briefly stated, the Part 100 regulations established a summary type procedure whereby the assessment officer, before any determination as to whether a charged violation had in fact occurred, served upon the mine operator a proposed penalty assessment order and advised him that if he failed to protest such penalty assessment within 15 days he would be deemed to have waived his right to protest and to a formal adjudication, and the proposed penalty assessment would become the final assessment order of the Secretary. If the operator filed a protest the assessment officer had authority to amend or reissue the assessment order, and it the operator failed to pay the amended or reissued order or petition for a hearing within 20 days he was sent a

[3] 30 C.F.R. section 301.83; revised and recodified as 43 C.F.R. section 4.546.

[4] Federal Register, Vol. 36, No. 11, January 16, 1971; Appendix, p. .

form letter advising him that the assessment order had become final and would be processed for enforcement in an appropriate District Court of the United States under section 109(a)(4) of the Act. (Appendix p. 2).

The record in the district court showed, and the court found, that under this procedure the assessment officer issued proposed assessment orders solely on the basis of unproved violation notices written up by mine inspectors, and without any finding as to the existence of an actual violation or any meaningful consideration of the six statutory criteria specified in section 109(a)(1) for determining the amount of the penalty. The court noted that assessment orders "seem to issue forth from a clerical machinery completely divorced from any genuine process of considered determination as to each case." 357 F.Supp. at 512.

In deposition testimony the assessment officer, Everett Turner, admitted that in issuing proposed assessment orders he made no independent determination that the charged violation had in fact occurred, but simply accepted the mine inspector's notice of violation at face value. His testimony on this point was, in pertinent part, as follows:

> (p. 341) Q Now, if the notice of violation states on its face what appears to be a description of a violation of a safety or health standard, do you pursue that any further, or do you accept that statement as representative of the existence of a violation?
>
> A We accept that if it states a violation as threatened in the description.
>
> * * *

> (p. 342) Q You do not find, though, that a violation did in fact occur; is that correct, other than your determination that what appears on the notice purports to charge the occurrence of a violation.
>
> A That is right.

The printed form used by the assessment officer in issuing proposed penalty assessment orders (Appendix p. 46) contained a boiler plate statement that consideration had been given to the six statutory criteria, but the evidence showed the contrary. The assessment officer admitted that "in the majority of cases" he adhered to a schedule contained in Appendix A to the Part 100 regulations, irrespective of the size of the mine.[5] A sample tabulation of 376 proposed assessment orders showed virtually no differential between penalties assessed against large mines and small mines for similar types of charged violations. For example, for alleged "accumulations of loose coal and coal dust" the same minimum amount ($5000) was assessed against mines employing five or six men and producing no more than 50 tons of coal a day as was assessed against 500 man mines producing as much as 6000 tons a day.[6]

After the operator had been notified that the assessment order had become final, and the case was to be transmitted to the Department of Justice for enforcement action, the clerical staff of the assessment office filled in the blank spaces on a pre-printed form

[5] Transcript of Everett Turner deposition, pp. 112-114.

[6] See Appendix Document J to Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue.

bearing the facsimile signature of the assessment officer, reading as follows:[7]

"I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____ PROPOSED ORDER OF ASSESSMENT DATED _____ DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

EVERETT TURNER
ASSESSMENT OFFICER

Mr. Turner's deposition testimony regarding findings of fact was as follows:

(p. 47) Q. In making the proposed assessments, do you make any written findings regarding the factual information, findings of fact regarding the alleged violation, or any findings respecting the various criteria that are specified – written findings I am talking about – such as size of the mine, whether the operator was negligent, past history of violations, the effect of the assessment upon the operator's ability to stay in business, or the operator's good faith in correcting the violations?

(p. 48) A. We do not make any written record as findings.

(p. 352) Q. Now, this form, which you have just identified as the form which is used when the case is referred to the Justice – the finding-of-fact form, which is used when the case is referred to the Department of Justice.

This is a printed form, is it not, Mr. Turner?

[7]A reproduction of this form appear at Appendix p. 45.

A. Yes; it is.

Q. And it has your name printed on it; right?

A. That one does; yes.

Q. And this is the form that has been used.

A. That is the form that has been used.

(p. 353) Q. Now, we will go back to the point where you have issued a proposed order of assessment.

When you send the proposed order of assessment to the operator you also send him a covering letter, do you not, which states that if he does not protest the order or ask for adjudication within 20 days, the order will become the final assessment order of the Secretary.

A. That is right.

Q. So now if an operator does not respond at that state, you then proceed to refer the case to the Solicitor's office; is that correct?

A. Well, the first step we take following that – and that is 20 days from his receipt of the proposed order or amended proposed order we issued, we allow time for the protest or his correspondence, and then we send him a letter telling him that it has become the final order of the Secretary because of his failure to respond.

(p. 354) Q. You send him what would be called a finality letter.

A. Yes.

Q. At the time you issue the finality letter to him, do you make any finding of fact; do you render any decision or notification within the record in the assessment file to the effect that a violation has in fact occurred?

A. Not at that stage. We tell him he has ten days to pay the amount or we will refer it to the Justice Department or the Solicitor's office for collection under the Federal Claims Collection Act.

Q. Now, if he fails to pay, do you then prepare the file for submission to the Solicitor's office?

A. Yes.

* * *

(p. 355) Q. And is it at that stage that you include in the file or you attach to the file this form that is marked as Exhibit No. 25?

A. At that stage – yes.

Q. Now, the finding of fact consists simply of this one sheet, this printed form –

A. That is the statement; yes.

From the time of adoption of the Part 100 regulation in January 1971 to June 1972 the assessment officer issued 7805 proposed orders of assessment for a total of $20,234,211, or an average of almost $2600 for each initial proposed assessment order.[8]

In granting summary judgment for the plaintiffs the district court concluded that the Part 100 procedures did not comply with the statutory requirements of section 109(a) of the Act. The court rejected the government's argument that all that is required is that the operator be given an "opportunity" for an adjudicatory hearing, and where he does not request a hearing the Act does not require that the Secretary issue a decision incorporating his findings of fact that a violation did occur and the amount of the penalty

[8]Turner deposition, p. 47.

which is warranted. The Court held that Section 109(a)(3) does not allow for defaults against the operator, and that it is the Secretary's responsibility to see that the statutory requirements are fulfilled in all cases, even where the operator does nothing. As stated by the Court:

> "In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made 'by decision incorporating his findings of fact therein.'" 357 F.Supp. at 512.

Upon appeal the Court of Appeals for the District of Columbia Circuit reversed the judgment of the district court, and held that where the mine operator does not request a formal hearing he has waived his right to a hearing, and the Secretary has no obligation to issue a decision incorporating his findings of fact either as to the occurrence of a violation or the application of the six statutory criteria.

SUMMARY OF ARGUMENT

The penalty assessment procedures adopted by the Secretary under his Part 100 regulation are contrary to the procedures expressly prescribed in Section 109(a)(3) of the Act in that they authorize the issuance of penalty assessment orders before any determination is

made that a charged violation actually occurred, and without any genuine consideration of the statutory criteria for determining the penalty amount.

The district court properly held that Section 109(a)(3) requires in all cases, whether the mine operator has exercised his opportunity for a hearing or not, that the Secretary must make findings of fact as to the occurrence of a violation and the appropriate penalty. The Court of Appeals was in error in holding that the Act does not require findings of fact where the operator has not requested a hearing.

The decision of the Court of Appeals is inconsistent with the clear and unambiguous intent of the statutory language as well as the overwhelming weight of judicial authority.

ARGUMENT

THE SECRETARY'S PART 100 ASSESSMENT PROCEDURE IS IN DIRECT CONFLICT WITH THE PROCEDURAL REQUIREMENTS EXPRESSLY MANDATED BY THE ACT

The assessment of fines or penalties is an adjudicative function. As such it necessarily involves the process of making a determination in the first instance that some event has occurred which calls for imposition of a fine or penalty. Such a determination requires, in turn, an examination into the factual situation relating to the alleged event, and findings respecting the same. Under established rules governing agency adjudicative functions

such determinations must be made in writing, and must include "A statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[9]

The language of Section 109(a)(3) of the Act is completely consistent with these recognized standards for adjudication of penalties. It requires that before a civil penalty is assessed there must be both an opportunity for a hearing and a determination by the Secretary that a violation occurred and the appropriate amount of the penalty.

The requirement for a *determination* respecting the occurrence of a violation and the appropriate penalty for such violation is an integral and indispensable part of the assessment function mandated by the statute. To read Section 109(a)(3) as requiring nothing more than an "opportunity for a hearing" is to dispense with the essential element of the adjudicative function with which the Secretary is charged under the Act, namely, the obligation to *determine* in any particular case whether there was in fact a violation for which the mine operator should be assessed a penalty, and how much that penalty should be.

The Secretary's obligation to provide the opportunity for a public hearing is not an alternative to his duty to perform his adjudication function. He cannot properly contend that he has discharged his adjudication function simply by giving the person charged with a violation an opportunity for a public hearing, and, having done that, he is relieved of the duty of making

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[9] Administrative Procedure Act, 5 U.S.C. sections 554, 557.

factual determinations. The statutory language requires him to make a factual determination respecting both the occurrence of the alleged violation and the amount of the penalty which is appropriate to such violation under the circumstances of the particular case.

The powers of an administrative agency must be exercised in accordance with, and in the mode prescribed by, the statute creating such powers, and an administrative agency cannot rightly dispense with any of the essential forms of proceedings which the legislature has prescribed in investing it with the power to act. *Burlington Truck Lines v. United States,* 371 U.S. 159, 9 L.Ed. 2d 207 (1962); *Atchison, T and S.F. Ry. v. Wichita Board of Trade,* 412 U.S. 800, 37 L.Ed. 2d 350 (1973); *Peters v. Hobby,* 349 U.S. 331, 99 L.Ed. 1129 (1955); *Stark v. Wickard,* 321 U.S. 288, 88 L.Ed. 733 (1944). In *CAB v. Delta Airlines,* 367 U.S. 316, 6 L.Ed. 2d 869 (1961) the Court held that an attempt by an agency to exercise a power without compliance with the procedural provisions laid down in the statute as to the manner of its exercise is a nullity.

Section 109(a)(3) of the Federal Coal Mine Health and Safety Act could not be more explicit in its requirements that civil penalties may be assessed *only after* the person charged with a violation has been given an opportunity for a public hearing *and the Secretary has determined,* by decision incorporating his findings of fact, that a violation did occur, and the amount of the penalty warranted.

It is manifest that the assessment procedures authorized by the Part 100 regulation do not comply with this statutory standard for administrative action. Under the Part 100 procedures the assessment officer's

proposed penalty order is issued in advance of any determination that there was in fact a violation, and if the mine operator doesn't protest it or request a hearing within a given number of days the order ripens into a final assessment order of the Secretary without any findings of fact having been made respecting the occurrence of a violation or the appropriate penalty for such violation. The "finding of fact" entered by the assessment officer after the assessment order has become final is nothing more than a *pro forma* conclusory statement which recites no underlying facts and gives no indication as to the grounds on which the "finding" was made. As stated by the district court, "To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a 'decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted.'" 357 F.Supp. at 512.

The language of this Court in the Burlington case, *supra,* is applicable here. In setting aside an order of the Interstate Commerce Commission, the Court noted:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. Expert discretion is the life-blood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. . . . The agency must make

findings that support its decision, and those findings must be supported by substantial evidence." 371 U.S. at 167.

In *Atchison, T and S.F. Ry. v. Wichita Board of Trade, supra,* the Court elaborated further upon the essential nature of agency findings, and noted that, in order to determine whether the course followed by the agency is consistent with its mandate from Congress,

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong. And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." 412 U.S. at 806. (Citations omitted).

In the present case the assessment officer's own description of the penalty assessment procedures under Part 100 demonstrates an almost total indifference to administrative due process and a flagrant disregard for the procedural requirements of the Act. He flatly admitted that the procedures of his office under Part 100 made no provision for documentation of the grounds upon which assessment actions are taken or the extent to which consideration had been given, if at all, to the six statutory criteria for determining penalty amounts.

This lack of documentation for assessment actions was a major point of criticism incorporated in a General Accounting Office report of its investigation into the functioning of the assessment office in early 1972.[10]

[10]Report No. B-170686 dated July 5, 1972 entitled "Improvements Needed in the Assessment and Collection of Penalties – Federal Coal Mine Health and Safety Act of 1969." This report is part of the record in the district court below as Exhibit No. 4 to Deposition of Defendant Elburt Osborn.

This report stated (p. 25) that the GAO investigators sampled 400 violations assessed by the assessment office, and that:

> "Because of the lack of any written guidelines defining the factors and describing the consideration and weight to be given each and the lack of documentation on the consideration given to each of the factors, we were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in these sample cases.

The report concluded (p. 27) that:

> "Proposed orders of assessment should be reviewed on a test basis by Assessment Office officials to evaluate assessor performance. However, documentation on how the penalty amount was determined was inadequate. The assessment worksheets, the only documentation of the assessment action, listed only the health and safety standards violated and the dollar amounts of the initial assessment and the reassessment for each penalty. There was no documentation showing how or whether the assessor considered (1) the six factors in arriving at the penalty amount or (2) the mine operator's protest when reassessing the case. In our opinion, such documentation is necessary for assessment officials to understand the reasoning behind an original assessment and to facilitate a management evaluation of an assessor's performance and of the overall assessment function."

The district court noted that this failure of the assessment officer to provide adequate documentation disclosing the reasons for his assessment orders deprived the penalized mine operator of his right to be apprised of the grounds for the action taken against him so that

he might be in a position to effectively respond or to defend himself against such action. The court stated:

> "Under the present procedure the operator has no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty. The initial burden at present is upon the operator to show why a possible arbitrary finding of violation or penalty is not appropriate, rather than being upon the Secretary to make a considered determination of violation and appropriate penalty." 357 F.Supp. at 513.

The Court of Appeals for the Third Circuit reached a similar conclusion in *Morton v. Delta Mining Inc.* 495 F.2d 38 (1974), where the Secretary of the Interior was seeking enforcement of penalty assessment orders issued under the Part 100 procedures. That case involved an appeal by the Secretary from three district court judgements denying enforcement on grounds that the Part 100 procedures did not comply with the statutory requirements. The Secretary contended that the statutory language requiring a "decision incorporating his findings of fact therein" applies only where the mine operator has requested a hearing, but the Court of Appeals rejected this contention and held that the language of Section 109(a) (3) requires that, whether or not the operator requests a hearing, "The assessment must be made by the Secretary's decision incorporating his findings of fact that a violation did occur and the amount of the penalty which is warranted."[11] The Court concluded that:

[11] 495 F.2d at 41.

> "Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite. Thus, though flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion. Judicial review is rendered practically impossible, or at least vastly more difficult, where the agency decision is not accompanied by express findings." 495 F.2d at 42.

As we have previously noted supra, the Secretary originally interpreted Section 109(a) (3) as requiring adjudicatory findings and decisions in all penalty assessment cases under the Act, and delegated to the Interior Department Board of Mine Operation Appeals the responsibility for penalty assessments under regulations which called for initial adjudication of penalty cases by a hearing examiner, with a right of appeal to the Board, and required that the examiner or the Board issue a decision incorporating findings of fact and conclusions of law respecting the occurence of a violation and the amount of the penalty.[12]

In setting up this procedure the Secretary was following the statutory mandate, as well as established rules of administrative practice. When he subsequently reversed his ground and adopted the informal short-cut method of assessing penalties under Part 100 he exceeded his statutory authority and breached the

[12] 30 C.F.R. Part 301, section 301. 83; subsequently recodified as 43 C.F.R. Part 4, section 4.545.

elemental standards recognized as essential to administrative due process.

THE DECISION OF THE COURT OF APPEALS IN THE PRESENT CASE CANNOT BE RECONCILED WITH THE OVERWHELMING WEIGHT OF THE COURT'S OWN PRIOR DECISIONS

In an almost unbroken line of administrative law cases the Court of Appeals for the District of Columbia Circuit has held that administrative determinations are not valid unless supported by adequate findings of fact and reasoned opinions. The Court's pronouncements on this point have been most frequent and emphatic. For example, in *USV Pharmaceutical Corp. v. Secretary of HEW* 466 F.2d 455 (D.C. Cir. 1972) it stated:

> "As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence." 466 F.2d at 462.

In *Greater Boston Television Corp. v. FCC* 444 F.2d 811 (D.C. Cir. 1970) the Court noted that its supervisory function in review of agency decisions "begins with enforcement of the requirement of reasonable procedure with fair notice and opportunity to the parties to present their case", and "continues into examination of the evidence and the agency's findings of facts, for the court must be satisfied that

the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inference of ultimate fact." 444 F.2d at 850. The Court went on to say:

> "Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or by-passing of the mandate in the legislative charter, but more broadly if the court becomes aware that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." 444 F.2d at 851.

Even where a statute authorizes informal discretionary action by an administrative agency the Court of Appeals has required findings and reasons to support such discretionary action. In *Environmental Defense Fund v. Ruckelshaus* 439 F.2d 584 (D.C. Cir. 1971) the Court, in reviewing an administrative refusal to suspend the registration of DDT, declared that the Administrator "has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion." The Court went on to say that: "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Discretionary decisions should more often be supported with findings of fact and reasoned opinions." 439 F.2d at 597.

The Court has repeatedly held that an administrative finding must state with clarity and completeness the facts and conclusions essential to support the agency order. Findings of fact should be made specifically and

should be a recitation of the basic facts established by the evidence, from which may be inferred the ultimate facts in terms of the statutory criteria required as a basis for a particular order. A mere finding of ultimate facts or a conclusionary statement without a finding of the underlying facts cannot be deemed sufficient to support agency action. *Saginaw Broadcasting Co. v. FCC* 96 F.2d 554, cert. den. 305 U.S. 613 (1938); *American Broadcasting Co. v. FCC* 179 F.2d 437 (D.C. Cir. 1949); *Nat. Geographic Society v. Unemployment Compensation Board* 438 F.2d 154 (D.C. Cir. 1970); *Environmental Defense Fund v. Hardin* 428 F.2d 1093 (D.C. Cir. 1970).

Unless a written finding of fact precedes the making of the order the agency is in a position to "back into" an order through the expedient of drafting findings of fact to support a proposed order previously issued. *USV Pharmaceutical Corp. v. Secretary of HEW* 466 F.2d 455 (D.C. Cir. 1972). In that case the Secretary of HEW adopted a summary procedure for issuance of orders withdrawing FDA approval of drugs determined to not have the effect they are represented to have. Under the Secretary's summary procedure the FDA Commissioner issued notice that he proposed to withdraw approval of certain drugs manufactured by the petitioner USV Pharmaceutical Corp., and stated in such notice that he would give any party who may be adversely affected by such order an opportunity for hearing to produce evidence as to why such approval should not be withdraw. HEW's procedural regulations provided that where it appears from the data submitted with a request for a hearing that no genuine and substantial issue of fact exists the Commissioner could

proceed to enter a final order withdrawing approval of the drugs in question. The Court of Appeals held this procedure "fundamentally defective", and stated the following reasons:

> "The Commissioner acted pursuant to 21 C.F.R. §130.14, the regulation establishing a summary judgment procedure for the Food and Drug Administration. This regulation is modeled after Rule 56 of the Federal Rules of Civil Procedure, the summary judgment rule of the federal district courts. As counsel for the government stated at oral argument, the agency's procedure is analagous to the procedure under Rule 56. A vital distinction, however, is that the Commissioner here was not an impartial arbiter of the contentions of opposing parties, but was himself the moving party undertaking to support his own proposed order.
>
> * * *
>
> "Under [Rule 56] the moving party has the burden of presenting evidence that establishes his right to summary judgment as a matter of law; and he may not, by the bare assertion that he is entitled to summary judgment, shift to his opponent the burden of establishing the contrary. *Evers v. Buxbaum*, 102 U.S.App.D.C. 334, 253 F.2d 356 (1958); *Washington Post Co. v. Keogh*, 125 U.S. App.D.C. 32, 365 F.2d 965 (1966).
>
> * * *
>
> "The Commissioner's notice of January 23, 1968 and his notice of July 10, 1968 parroted the language of the statute without reference to any evidence. In short, at no time did the Commissioner set forth the facts and reasons upon which he relied in reaching his conclusion that no material issue of fact existed. We think that such an application of the Commissioner's summary

judgment rule is not in harmony with the principle of the rule and is fundamentally unsound and unfair." 466 F.2d 455 (1972) at 460, 461.

The procedure declared invalid in *USV Pharmaceutical* is analagous to the penalty assessment procedures followed under Part 100. Under Part 100 the Secretary's assessment officer is not an impartial arbiter but is himself "the moving party undertaking to support his own proposed order", and without reference to any evidence he issues a *pro forma* conclusory finding of fact to support his assessment order only after that order has become final.

It is evident that in its decision in the present case the Court of Appeals disregarded its oft-repeated insistence that findings of fact "are not mere procedural niceties", but are essential to effective judicial review to determine whether agency decisions comply with statutory standards. Here the Court went off on a tangent, holding that an operator's failure to request a hearing "suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed", and in such a case "We do not believe that Section 109(a) (3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order." 494 F.2d at 991.

This latter assertion underscores the error of the Court's ruling. The record in the district court showed that proposed assessment orders were issued on a preprinted form[13] containing no factual description of

[13] Appendix pp. 46, 47.

the alleged violation, no finding that the violation had in fact occurred, no information showing whether and in what manner the six statutory criteria had been applied for purposes of determining the penalty amount, or anything else that would show that a considered determination had been made. On the basis of the record the district court found that the proposed assessment order gave the operator "no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty." 357 F.Supp. at 513.[14]

Proceeding on its erroneous assumption that the operator's failure to request a hearing indicates that no disputed issues exist, the Court of Appeals rationalized that under Section 109(a) (3) the Secretary "need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" 494 F.2d at 992. In support of this conclusion the Court cited *FPC v. Texaco* 377 U.S. 33, 12 L.Ed. 112 (1964); *Denver Union Stockyard v. Producers Livestock Assn.* 356 U.S. 282, 2 L.Ed. 2d 771 (1958); *United*

[14] Commenting on this same point in the *Delta Mining Co.* case, *supra*, The Third Circuit Court of Appeals noted that "the proposed assessment orders in this case contained *no* 'information' other than *pro forma* recitations that the six criteria for determining penalty amounts had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet received, information to which, under our view of the Act they are entitled." 495 F.2d at 44, (emphasis in original).

States v. Storer Broadcasting Co. 351 U.S. 192, 100 L.Ed. 1081 (1956); *Weinberger v. Hynson, Westcott and Dunning* 412 U.S. 609, 37 L.Ed. 2d 207 (1973).

A review of these cited cases shows that they are not pertinent to the issues here presented. The *Texaco* and *Storer Broadcasting Co.* cases involved, in substance, a challenge to agency rule-making authority. In *Texaco* this Court held that where an agency properly promulgates standards under which licenses may be issued it is not necessary for the agency to proceed on a case-by-case basis to provide hearings on applications which on their face do not meet such standards. *Storer Broadcasting* was decided on the same grounds. There the FCC denied a broadcaster's license application without a hearing because the applicant already owned and operated the maximum number of television stations permitted under the FCC rules. In the *Denver Union Stockyard* case it was held that the Secretary of Agriculture was not obligated to hold a hearing on a complaint by a marketing agency on a rule of the Stockyard Association which was invalid and void on its face. *Weinberger v. Hynson, Westcott and Dunning* is directly adverse to the conclusion reached by the Court of Appeals here. In that case this Court held that the FDA improperly denied a hearing on an application for approval of a new drug, and vacated the FDA Commissioner's order withholding approval of the drug.

Thus, the decision of the Court of Appeals here is not in fact supported by the cases cited in its opinion.

THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE LEGISLATIVE HISTORY OF THE ACT

In support of its conclusion that absent a request by the operator for a hearing the Secretary is not required to make findings of fact, the Court of Appeals adverted to the legislative history of Section 109(a) (3), and reached a result wholly inconsistent with the plain words of the statute as enacted. Although petitioners contend there is no warrant for going behind the unequivocal language of Section 109(a) (3), they are convinced that an objective reading of the legislative history shows that Congress did not intend to authorize assessment of penalties under summary procedures such as those utilized under the Part 100 regulation, and, in fact, refused to adopt language recommended by the Department of the Interior to this effect.

At the time this legislation was being considered by Congress in 1969 the Interior Department submitted recommendations in the form of draft bills which were introduced as the so-called Administration Bills, S. 1300 and H.R. 7976. The penalty assessment procedures proposed in such bills would authorize the Secretary to issue a penalty assessment order solely on the basis of a charged violation, and would allow the mine operator thirty days from receipt of such order to request a hearing by a board to be known as the Federal Coal Mine Health and Safety Board of Review. The pertinent language appeared in section 113 of S. 1300 and H.R. 7976 as follows:

> "Section 113.(a) The operator of a coal mine in which a violation occured of a mandatory health

or safety standard promulgated under this title may by order be assessed a civil penalty by the Secretary which penalty shall be not more than $10,000 for each occurence of a violation of a mandatory health or safety standard.

* * *

(b) Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Board shall afford such operator an opportunity for a hearing and, in accordance with the request, determine by decision whether or not a violation of a mandatory health or safety standard did occur and whether the amount of the penalty is warranted or should be compromised."

The bill ultimately approved by the House (H.R. 13950) retained a portion of this language, but added at the end of subsection (a) a clause reading "No penalty shall be assessed under this subsection pending the final termination, expiration, or completion of all proceedings, administrative, or judicial, for review of an order or decision under this title." The House bill also substituted the word "Secretary" for the word "Board" in subsection 113(b).[15]

The bill approved by the Senate (S. 2917) retained none of the language proposed by the Administration bills. It provided:

"Section 308(a) (3) An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom

[15]Legislative History Federal Coal Mine Health and Safety Act, compiled by the Committee of Education and Labor, House of Representatives, March 1970, p. 932.

the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact based on the record of such hearing whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of Title 5 of the United States Code shall apply to any such hearing and decision."[16]

The respective bills were referred to a Senate-House Conference Committee and the bill approved by the conferees retained the substance of the Senate language respecting penalty assessments, but slightly rephrased the wording from "by decision incorporating findings of fact based on the record of such hearing whether or not a violation did occur . . ." to read "by decision incorporating his findings of fact therein, that a violation did occur . . .". The Conference Report gave no explanation for the changed wording, but simply stated:

Both the Senate bill and the House amendment provided an opportunity for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any notice or order involving a violation of a standard."[18]

[16]Legislative History, p. 546.

[18]Legislative History, p. 1033.

The Conference Committee bill was subsequently approved by both Houses, and signed into law by the President on December 30, 1969.

The Secretary argued in the Court of Appeals that the deletion of the words "on the record of such hearing" should be construed as indicating a congressional intent that "a decision incorporating his findings of fact" is required only where a hearing is held. The Court of Appeals accepted this argument, and by a curiously inverse process of reasoning concluded: "In view of the *explanation* provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills." 494 F.2d at 994; emphasis added.

The Third Circuit Court of Appeals considered this same point in the *Delta Mining Co.* case, and concluded:

> "Nothing in [the legislative] history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested." 495 F.2d at 41-42.

The Third Circuit's assessment of the legislative history is accurate. One looks in vain for any evidence that the plain words of section 109(a) (3) were intended to mean anything other than what they say.

THE ACT DOES NOT PROVIDE FOR ASSESSMENT OF PENALTIES BY DEFAULT

In a footnote to its opinion the Court of Appeals suggested that the part 100 procedure "is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgement entered against him. Federal Rules of Civil Procedure 55."[19]

This analogy is a superficial one, which does not stand up under critical examination. The assessment officer's proposed assessment order is in no sense comparable to a complaint in a civil action wherein the moving party spells out the various factual allegations upon which he relies in seeking judgement, and submits his cause to an independent and impartial judicial authority. Under Part 100 the assessment officer takes upon himself the combined role of moving party and deciding authority, and sets up his own rules under which his "complaint" becomes his own final judgement.

The established principles of administrative law which we have heretofore discussed do not permit government agencies to issue decrees in this manner. They require, instead, that agency orders be adequately supported by reasoned determinations and findings of fact so that effective judicial review of such orders is possible. In this respect administrative law does not allow for default judgements in the manner authorized in judicial proceedings under the Federal Rules of Civil Procedure.

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[19] 494 F.2d at 992, fn. 32.

The Secretary has not been unaware of correct administrative procedure. As previously noted, he originally adopted procedural rules under which assessment proceedings were initiated by the filing of a petition for assessment with the Interior Department Board of Mine Operations Appeals,[20] a copy of the petition was served upon the operator who was then required by the rules to file an answer within 30 days,[21] and in the event of his failure to file a timely answer the Hearing Examiner or Administrative Law Judge could assume the truth of the facts alleged in the petition for assessment and proceed to make findings respecting the occurence of the charged violations and to determine the amount of the penalty taking into account the criteria specified in section 109(a) of the Act.[22] By following this procedure the Secretary can properly provide for summary disposition of uncontested cases, and at the same time meet the procedural standards of the Act and the requirements for effective judicial review.

The Secretary cannot be heard to complain that the fact finding requirement of the Act are too cumbersome to deal with the large volume of penalty cases. If this is a valid complaint it should be addressed to Congress with a request for authority to use summary procedures. He has no authority under the existing law to disregard the procedural requirements of section 109(a) (3).

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[20] 30 C.F.R. Part 301, section 301.50; subsequently recodified as 43 C.F.R. Part 4, section 4.540.

[21] 43 C.F.R. section 4.541.

[22] 43 C.F.R. section 4.544.

CONCLUSION

The district court properly found that the Secretary exceeded his statutory authority by adopting the Part 100 procedures, and that such procedures are in conflict with the express requirements of section 109 of the Act. The Court of Appeals was in error in reversing and setting aside the judgment of the district court, and its ruling should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1974

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-14a) is reported at 494 F. 2d 987. The opinion of the district court (Pet. App. B, pp. 1b-15b) is reported at 357 F. Supp. 509.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1974. A timely petition for rehear-

ing with a suggestion of rehearing *en banc* was denied on April 24, 1974. The petition for a writ of certiorari was filed on July 23, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the procedures by which the Secretary of the Interior assessed civil penalties under the Federal Coal Mine Health and Safety Act of 1969 before March 15, 1973, were invalid.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth as indicated at pp. 2-3 of the government's Brief in *Morton* v. *Delta Mining, Inc.*, No. 74-521.

STATEMENT

In our Brief in the related case of *Morton* v. *Delta Mining, Inc.* (No. 74-521), which has been consolidated for argument with this case, we summarized the statutory scheme, pertinent regulations, and administrative procedures followed by the Secretary of Interior in assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801, *et seq.* (Gov't Brief, pp. 3-16).[1] In *Delta*, the Secretary sought to enforce his assessment orders against the respondent coal mine

[1] We have served a copy of our Brief in *Delta* on petitioners' counsel in this case.

operators by suits for enforcement in the district courts; under the Act, the operators were entitled to a trial *de novo* on all relevant issues (Section 109(a)(4)).

The procedural context of this case differs from that in *Delta*, although the issue presented in both cases is the same. Petitioners here are an association of coal mine operators and various individual coal mine operators. They sued in the United States District Court for the District of Columbia for an injunction and a declaratory judgment, claiming that the Secretary's regulations establishing administrative procedures for assessing civil penalties (30 C.F.R. Part 100 (1972 ed.)) were contrary to the Act (App. 11-27).

In March 1973, the district court, on motions for summary judgment, declared invalid the then current Part 100 procedures for assessing civil penalties[2] and permanently enjoined the Secretary from continuing to utilize or enforce those procedures. The Secretary had argued that the language in Section 109(a)(3), pertaining to a "decision incorporating * * * findings of fact" applied only when the operator had requested a "public hearing" under that Section and one had been held; the District Court, however, agreed

[2] The orders the Secretary sought to enforce in *Delta* were issued under the regulations published January 16, 1971 (App. 4). As noted in our *Delta* Brief (p. 6, n. 8), these regulations were modified in certain respects, not here significant, in June 1972. These modified regulations were enjoined by the district court in this case; they are contained in an Addendum to the government's Brief in *Delta*, pp. 7a-13a.

with petitioners that the findings of fact requirement applied in all cases, regardless of whether an administrative hearing was held. The court of appeals reversed, concluding that the language of Section 109 (a)(3) was "logically capable" of either construction, but that the pertinent legislative history supported the Secretary's interpretation (Pet. App. A, pp. 6a-7a, 11a-14a). Moreover, the court pointed out that findings of fact were not needed "when there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" (*id.* at p. 10a).

ARGUMENT

The procedures to which petitioners object, and which the district court declared invalid and enjoined, are no longer utilized by the Secretary in assessing civil penalties under the Coal Mine Health and Safety Act.[3] As we pointed out in our Brief in *Delta* (p. 16), a revised Part 100 became effective on August 1, 1974, after the decision of the court of appeals in this case.[4] Under the new procedures, all proposed assessments identify not only the notice of violation and the amount of the penalty, but also contain formula determinations ("penalty points") pertaining to each of the six statutory criteria. Accordingly, for every charged violation the coal mine operator is now given "information showing * * * in what manner the six statutory criteria ha[ve] been applied for purposes of determining the penalty amount" (Pet. Br., p. 25).[5] Therefore, the formula system now in effect substantially meets petitioners' objections to the former procedures.

[3] We do not believe, however, that this case is moot since a declaratory judgment that the prior procedures were invalid might affect the Secretary's ability to obtain judicial enforcement of penalties assessed under those prior procedures.

[4] As the court of appeals noted, similar procedures had been published before the decision below (Pet. App. A, p. 4a n. 12); the current procedures became effective thereafter.

[5] Petitioners apparently also contend that the administrative procedures that the Secretary used in making his initial determination of the penalty amount were inadequate, both because there was allegedly no finding that the violation had in fact occurred and because there was no "meaningful consideration" of the statutory factors (Pet. 6). But the Secretary's assessment orders have always incorporated by reference the notices of violation, and these notices contain findings by the Coal Mine Inspector, as the "Authorized Representative" of the Department of the Interior, that the specified violation occurred. See, *e.g.*, government *Delta* Brief Add., p. 22a. There is thus no possible doubt concerning the violations upon which the proposed and final assessment orders are based; if the operator disputes their occurrence he may request a hearing and put the Secretary to his proof. If he does not, the formal finding is made before the case is referred for litigation.

The proposed order of assessment typically states that the statutory factors have been considered (see, *e.g.*, government *Delta* Brief Add., pp. 20a-21a), and the record indicates that in determining the amount of the assessment, the assessment officer relied on the regulatory guidelines, which incorporated the Secretary's conclusions concerning the relative weights to be given to the various factors (App. 41). Although petitioners may disagree with these conclusions, that does not indicate the factors were not meaningfully considered. Instead, the weight given to each factor is a matter of judgment specifically reserved to the Secretary. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416; *Camp* v. *Pitts*, 411 U.S. 138.

In any event, those objections are not well taken. For the reasons set forth in our *Delta* Brief, we submit that the court of appeals correctly concluded that the Secretary's former Part 100 procedures complied with Section 109(a)(3) of the Act. As we there argued (Brief, pp. 18-27), the more natural reading of Section 109(a)(3) is that factual findings are required only when the mine operator has taken advantage of the opportunity for a public hearing, particularly since the operator is entitled to a trial *de novo* before judicial enforcement of an assessed penalty that the operator has refused to pay. The findings of fact requirement traditionally refers to the end product of a hearing and, under the Administrative Procedure Act (5 U.S.C. 554(a)(1)), a hearing is not essential before final agency action if a subsequent trial *de novo* is provided. Thus, the striking feature of Section 109(a)(3) is that the operator is even afforded an opportunity for a decision incorporating findings of fact after a hearing.

We therefore believe, as we stated in our *Delta* Brief (pp. 23-24), that Section 109(a)(3) on its face does not require factual findings in the absence of a hearing. But even if the statute could reasonably be read as imposing such a requirement, the legislative history of the statute is firmly against it. Section 109(a)(3) emerged in its present form from a Conference Committee, appointed to resolve differences between the House and Senate bills, yet the House and the Senate versions of the provision at issue here were in agreement: findings of fact were

required only after a hearing (*id.* at pp. 24-27). Beyond this, there is no reason why Congress would have provided for factual findings in the absence of a hearing. The administrative burden on the Secretary from such a requirement would be extraordinary (80,000 notices of violation are issued yearly) and, in view of the operators' opportunity for an administrative hearing and the availability of a trial *de novo*, it is at best doubtful whether any substantial benefits would be gained from such a requirement (*id.* at pp. 27-31).

We add only that the cases[6] upon which petitioners rely as indicating the necessity for administrative findings are cases in which a hearing has been held, or in which the agency findings are subject to review under the substantial evidence test (Pet. Br., pp. 15-16, 20-22).[7] In contrast, the issue

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[6] Petitioners also cite the General Accounting Office Report of July 5, 1972, criticizing the Secretary's assessment procedures (Pet. Br., pp. 16-17). That report specifically concludes that "a description of how the [statutory] factors were actually considered in determining a specific penalty does not have to be given in the proposed order of assessment sent to the mine operator" (*Delta* App., p. 90).

[7] *U.S.V. Pharmaceutical Corp.* v. *Secretary of Health, Education and Welfare*, 466 F.2d 455 (C.A.D.C.), upon which petitioners rely, is of the latter type, see 21 U.S.C. 355(h). The court there found summary procedures inadequate under a regulation which required the presentation of facts justifying relief in order to obtain a hearing after the agency had taken adverse action. In contrast, Part 100 has never required more than a simple request for a hearing, and no penalty need be paid before a hearing is available.

In any event, the persuasiveness of *U.S.V. Pharmaceutical* as support for petitioners' position is dubious in light of this

here is whether such findings are necessary in the absence of any request for a hearing, where enforcement is only after a trial *de novo* in the district court. See 5 U.S.C. 554(a)(1); government *Delta* Brief, pp. 22-23, 28-34.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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MAY 1975.

Court's decision in *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620-622, upholding the validity of the regulation which was at issue in *U.S.V. Pharmaceutical*, on the ground that:

> We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's "pleadings" that the application cannot succeed.

As the court of appeals in this case concluded, there is similarly no need for findings of fact when the affected party indicates, by not even requesting a hearing, that there is no genuine factual dispute (Pet. App. A, p. 10a).

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